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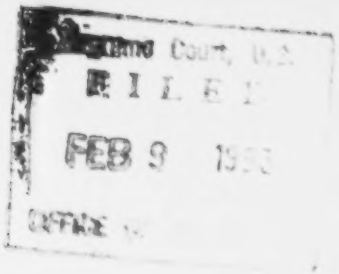

NO. ( )

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN LOWERY, III,
PETITIONER

vs.

DONNA SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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131 pp

QUESTIONS PRESENTED

I.

WHETHER THE SECRETARY'S REFUSAL TO CONSIDER EVIDENCE PREVIOUSLY SUBMITTED IN PETITIONER'S CLAIM CONSTITUTE ACTIONS WHICH ARE ARBRITRARY AND CAPRICIOUS

II.

WHETHER THE SECRETARY'S FAILURE TO HOLD A FAIR HEARING ON ALL OF THE EVIDENCE CONSTITUTES A VIOLATION OF THE PETITIONER'S DUE PROCESS AND EQUAL PROTECTION

LIST OF PARTIES

The Petitioner, JOHN LOWERY, III, Plaintiff/Appellant and the Respondent, LOUIS W. SULLIVAN, M.D., sub. nom., Secretary of Health and Human Services.

The Respondent has been succeeded in office by DONNA SHALALA who is automatically substituted as Respondent.

Petitioner is an individual, and as such, has no parent company, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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JOHN LOWERY, III,
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vs.

DONNA SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
RESPONDENT

_____

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

COMES NOW JOHN LOWERY, III, the Petitioner herein, by and through his undersigned attorney, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit dated November 12, 1992.

OPINIONS BELOW

On November 12, 1992 the Eleventh Circuit Court of Appeals denied the Petition for

Rehearing and Suggestion of Rehearing En Banc is unrecorded and is reproduced in the Appendix B at 2a. This follows an Order of the Eleventh Circuit Court of Appeals issued pursuant to 36-1 (11th Cir. Rule 36-1, Affirmation Without Opinion) issued September 17, 1992 which is unrecorded and is reproduced in the Appendix A at 1a.

On June 21, 1991 the District Court for the Northern District of Georgia, Atlanta Division entered an Order from the Report and Recommendation of the United States Magistrate dated March 18, 1991 denying the Petitioner's Complaint. The Order of the District Court was unrecorded as was the Report and Recommendation of the United States Magistrate and both of these are reproduced in the Appendix C at 4a-14a, and Appendix D, at 15a-25a, respectively.

The Appeals Council in its decision of May 25, 1990 found and reproduced in the Appendix E at 26a-30a granted the Petitioner a partial favorable decision in that he was awarded benefits as of December 5, 1985 but not prior thereto. This follows the adverse recommended

unrecorded and is reproduced in the Appendix B at 2a. This follows an Order of the Eleventh Circuit Court of Appeals issued pursuant to 36-1 (11th Cir. Rule 36-1, Affirmation Without Opinion) issued September 17, 1992 which is unrecorded and is reproduced in the Appendix A at 1a.

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The Appeals Council in its decision of May 25, 1990 found and reproduced in the Appendix E at 26a-30a granted the Petitioner a partial favorable decision in that he was awarded benefits as of December 5, 1985 but not prior thereto. This follows the adverse recommended decision of the Social Security Administrative

II.

WHETHER THE SECRETARY'S FAILURE TO HOLD A FAIR HEARING ON ALL OF THE EVIDENCE CONSTITUTES A VIOLATION OF THE PETITIONER'S DUE PROCESS AND EQUAL PROTECTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions which are relevant to the decision in this case are *Amendment V* which provides in part:

> "No personal shall...be deprived of life, liberty or property, without due process of law..."

and

Amendment XIV, which provides in part:

> "Nor deny to any person within its jurisdiction the equal protection of the laws..."

Judicial review of cases arising under Title II of the Social Security Act, as amended, is provided for in §205(g) of the Act, 42 U.S.C.A. §405(g), in pertinent part provides:

> "(g)....The judgment of the Court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions..."

Section 223(d)(1)(A) of the Social Security Act, as amended, 42 U.S.C.A. §423(d)(1)(A)

provides in part:

> "(d)(1) The term disability means—
>
> (A) Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or..."

Congress authorized the promulgation of regulations to the Secretary of Health and Human Services, who in turn delegates the authority of the Social Security Administration. The Social Security Administration promulgates regulations as Part IV and published in the Federal Register under 20 C.F.R. 404, Subpart P., et.seq.

STATEMENT OF THE CASE

a. Course of Proceedings Before the Secretary

This is an appeal arising from whether the Petitioner is entitled to a period of disability under Section 216(i) and to disability insurance benefits under Section 223(a), and whether the Petitioner is disabled under Section 416(a)(3)(A) of the Social Security Act, as amended.

Petitioner filed an application for a period of disability and disability insurance benefits

alleging that his disability commenced in May, 1981 due to the residuals of back surgery. Based on that application, Petitioner was awarded benefits in February, 1982.

Petitioner thereafter was notified by the Defendant that the Petitioner's disability had ceased in March, 1983, and an administrative hearing on the issue of the cessation of Petitioner's disability was held before an Administrative Law Judge (hereinafter referred to as the ALJ). The ALJ found on January 25, 1984 that the Petitioner's disability had in fact ceased in March, 1983. (T-336-341)[1]

Following the cessation of his benefits in the decision of January 25, 1984, Petitioner filed another application for the same benefits and alleged an onset of his disability to be June 1, 1983. (T-352) After denying his claim, an

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[1]When the Respondent filed his Answer on or about October 1, 1987 he filed a certified copy of the transcript (T-1 through T-472) and a supplemental transcript (T-473 through T-864) was filed on August 1, 1990. Petitioner will make reference to the appropriate transcript pages by "T" followed by corresponding numbers making reference to both the original transcript as well as the supplemental transcript. Note the transcript filed on October 1, 1987 did not contain several Exhibits nor the transcript of the administrative hearing held on February 5, 1982. (emphasis added) (See Court Transcript Index filed on October 1, 1987)

administrative hearing was held on May 2, 1986 before the Honorable Alfred A. Quillian, Administrative Law Judge (hereinafter referred to as "ALJ"). The ALJ rendered an adverse decision on September 9, 1986 which was affirmed by the Appeals Council on April 21, 1987. (T-4)

b. Proceedings in the District Court

Petitioner filed a civil action in the United States District Court, Northern District of Georgia, Atlanta Division as allowed by law on June 25, 1987 (Civil Action: File No. 87-CV-1420-ODE). On October 6, 1988 the United States District Court remanded that case to the Secretary for de novo consideration in light of the recommendation of the Honorable John E. Dougherty, United States Magistrate Judge, issued on August 1, 1988.[2]

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[2]Pending the civil action in District Court, the Plaintiff filed an additional application for a period of disability and disability insurance benefits on October 27, 1986. Following administrative hearing, an adverse decision was issued on January 28, 1988 by the Honorable Joel S. Thwaites, Administrative Law Judge (ALJ) which decision was affirmed by the Appeals Council in its Order dated August 11, 1988. Thereafter, the Petitioner filed a new civil action in Case No. 1:88-cv-2450-ODE which, based upon the Respondent's Motion to Remand, was sent to the Appeals Council without hearing the case on its merits. The Appeals Council, on its own motion, consolidated the claims folder of the Petitioner's application in September, 1984 (as same relates to the 1987 case) and the subsequent action in

Petitioner filed an additional application for a period of disability and disability insurance benefits on October 27, 1986. Following administrative hearing, an adverse decision was issued on January 28, 1988 by the Honorable Joel S. Thwaites, Administrative Law Judge (ALJ) which decision was affirmed by the Appeals Council in its Order dated August 11, 1988.

An administrative hearing was held on January 29, 1989 before the Honorable Joel S. Thwaites, Administrative Law Judge where testimony was received by the Petitioner and his wife, Debra Lowery, and Vocational Expert, Dr. Richard Smith. Following the hearing of January 29, 1989 an adverse decision was issued by ALJ Thwaites on August 31, 1989 recommending that the Petitioner's application be denied. (T-499, 514) Thereafter, objections were filed to the

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October, 1988. (T-524)

Petitioner objected to the actions of the Appeals Council in their consolidation of the two civil actions since it did not have the constitutional authority to modify Article Three, the Judge's Order of October 15, 1989 (remanding the 1988 case) and the Judge's Order of October 6, 1988 (remanding the case for a correction of errors as it relates to first civil action pending the Petitioner's application of 1984).

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Council in their consolidation of the two civil actions since it did not have the constitutional authority to modify Article Three, the Judge's Order of October 15, 1989 (remanding the 1988 case) and the Judge's Order of October 6, 1988 (remanding the case for a correction of errors as it relates to first civil action pending the Petitioner's application of 1984).

counsel and a new decision was issued by the Appeals Council on May 25, 1990.(T-476, 479) At that time, the Appeals Council issued a partially favorable decision granting Mr. Lowery a period of disability and disability insurance benefits commencing on December 5, 1985 but not prior thereto. (T-479) See Appendix E, 30a.

Thereafter, the Petitioner filed a Motion to Reopen the 1987 case, and said Motion was granted by the Court in its Order dated September 10, 1990. (T-478, 476) The Magistrate Judge issued a Report and Recommendation on March 18, 1991 (see Appendix D, 25a) holding that the Petitioner was not entitled to a period of disability and disability insurance benefits prior to December 5, 1985, and the Honorable Orinda D. Evans, United States District Judge issued an Order on June 21, 1991 adopting the Report and Recommendation of the United States Magistrate Judge. Thereafter, a timely Notice of Appeal was filed by the Petitioner on July 19, 1991.

c. Proceedings in the Court of Appeals

his lower back and problems with sleeping at night due to awakening because of his pain. (T-55;54) He has difficulty standing and has to strain to walk at times. (T-49) He testified to being in constant pain and cannot concentrate despite his efforts to practice and compose guitar music. (T-50) His only therapy in October, 1983 is swimming three to four times a week, if he is able to per his doctor's instructions. (T-52; 55) The ALJ notes that the Petitioner is not taking any medications nor receiving any medical treatment because Petitioner "cannot afford it". (T-45)

Petitioner testified to having trouble sitting due to numbness and he can stand and walk "only so long". (T-52) He attempted to get assistance with vocational rehabilitation but was unable to complete an electronic retraining due to the severity of his pain. (T-52; 53)

As to his emotional condition, there was little testimony solicited except where the Petitioner states "just my normal activities now seem to bother me. I'm having a problem dealing with myself", and "...at times I am not in tears

but almost, but I have more bad days than good days". (T-54; 56)

Vocational testimony at the hearing of October 5, 1983 held in part that if the Petitioner's testimony was deemed credible then the Petitioner would not be able to work on a regular basis due his severe pain. (T-58; 59)[3]

The consultative examination by Dr. Bert Loftman in October, 1979 which reflected evidence of hereniated disc which "has partially incapacitated this man" (T-418; Exhibit C-25); myleogram in April, 1981 which demonstrated herniated disc (Exhibit 26); Exhibit C-27 which included the admission records for the Petitioner's laminectomy and fusion in May, 1981; Petitioner's hospitalization in November 1981 for low back pain and depression (Exhibit C-28); and treatment notes from Dr. G. Lee Cross, III (Exhibit C-30). All of these exhibits reflected treatment of the Petitioner's physical and emotional conditions at a time prior to the third

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[3]Petitioner will supplement where necessary evidence obtained from subsequent administrative hearings in May 2, 1986 and January 29, 1989.

hearing on May 2, 1986.

At the time of the administrative hearing of May 2, 1986 there exists the consultative orthopaedic examination performed at the request of the Defendant by Dr. Robert T. Willingham, Jr. in October, 1985. (See Exhibit C-31) Dr. Willingham notes that by history Mr. Lowery has had significant and persistent pain with occasional radiating pain into the legs yet upon his limited examination was essentially normal with the exception of limitations in lumbar flexion and lateral bending. (T-447) Dr. Willingham indicates that because of the Petitioner's "disability as a result of his surgery and the fusion of his lower lumbar spine", Mr. Lowery is rated 35% for his whole body and is precluded from heavy work involving heavy bending or lifting. (T-447; 448) The physician stated that Petitioner was capable of sedentary work. Note that Dr. Willingham did not give any specific functional limitations of Petitioner's ability to perform certain physical work activities such as lifting limitations (can he lift more than 5-10 pounds occasionally) or

ability to sit and stand in a regular eight (8) hour day.

Following the administrative hearing of May 2, 1986 two (2) pieces of additional medical evidence were considered by the ALJ prior to the issuance of his decision denying Petitioner's claims on September 9, 1986. In the initial award of benefits to Mr. Lowery on February 16, 1982 by the Honorable Saul Gordon, Administrative Law Judge, Petitioner's problems with pain and problems associated with his "depression limit the Petitioner from performing basic work-related activities in a normal work environment at any exertional level". (T-282) The treating psychiatrist in November, 1981 noted that Mr. Lowery had a "conversion disorder, dysthmic disorder, persistent chronic back pain, persistent pain stresses and inability to function", and that following his release from the psychiatric hospitalization his symptoms worsened. (See Exhibit 30 as noted by the ALJ in his decision at T-282)

Exhibit C-33 is a psychological evaluation performed by Dr. Robert J. George on May 12,

1986. During the interview and testing Mr. Lowery had to stand frequently because of "apparent physical discomfort". (T-454)

Intelligence testing showed that Mr. Lowery had a Full Scale I.Q. of 82 or functioning at the low end of the "LOW AVERAGE" range of intelligence. (T-453) Dr. George opined that the Petitioner had in the past functioned at a higher intellectual level, and that the Petitioner's reduced level of intellectual functioned was caused by chronic pain, depression and anxiety. (T-454)

Dr. George's personality testing revealed the Petitioner to be a "most significantly and clinically depressed individual", emotionally fragile, and had almost non-existent coping skills and ego strength which would cause him to have extreme difficulties dealing with any form of stress and tension, either real or perceived. (T-454) Despite his other health problems, Dr. George stated that the Petitioner was incapable of gainful employment from a psychological point of view because of his impoverished level of emotional functioning. (T-455)

In addition to his narrative report, Dr. George completed a Mental Status Questionnaire addressing how Mr. Lowery's psychological status would limit his ability to perform in certain work activities. He concluded that the Petitioner would be severely limited in responding to customary work pressures; responding appropriately to co-workers; and performing both complex and varied tasks. (T-458) Note that in all of the other work activity categories Mr. Lowery had impairments which seriously affected his ability to function. (T-457; 458)

The Respondent requested that the Petitioner be examined by another psychologist, Dr. Eric R. Duerr. During this examination the Petitioner was observed to walk "slowly and stiffly" and was only able to sit up to 35 minutes at the longest. (T-460)

Intelligence testing showed that the Petitioner had a Full Score I.Q. score of 83 or functioning at the low end of the "LOW AVERAGE" range of intelligence. (T-462) During the intelligence testing it was observed that the

Petitioner had difficulty maintaining a steady pace of working, and he "became visably tired". (T-462) According to Dr. Duerr the Petitioner showed four (4) impairments, each with varying degrees of severity. Petitioner's daily activities were poor due to his chronic pain and physical limitations yet the quality of his social relations is judged to be fair and he had not suffered any personal deterioration. (T-466; 467) However, Dr. Duerr notes the Petitioner's difficulties with concentration and tiredness. (T-467)

As part of Exhibit C-34, Dr. Duerr completed an assessment in some ways similar to Dr. George's Mental Status Questionnaire addressing how Mr. Lowery's psychological status would limit his ability to perform in certain work activities. He concluded that the Petitioner would be severely limited in responding to customary work pressures; responding appropriately to co-workers; and performing both complex and varied tasks. (T-458) Note that in all of the other work activity categories, Dr. Duerr concluded that Mr. Lowery had impairments

which seriously affected his ability to function. (T-457; 458)

e. ALJ'S Evaluations and Findings

In spite of the uncontested medical evidence regarding his psychological and emotional condition, the Secretary held that the Petitioner was no longer disabled. In the adverse decision of January 25, 1984 the ALJ, even with prior knowledge of the Petitioner's emotional condition, both the psychiatric hospitalizations as well as the ALJ's earlier findings in February, 1982, the ALJ failed to even address Mr. Lowery's emotional condition.

The ALJ does not make any credibility determination as to the severity of the Petitioner's emotional condition nor does he discuss the medical evidence relating to his mental illness.

For these reasons, the Petitioner contends that the Secretary's denial can only be viewed as arbritrary and capricious.

f. Appeals Council's Order of May 25, 1990

The Appeals Council concurred with the physical assessment that Mr. Lowery had the

ability to do sedentary work allowing him to alternate positions and not requiring use of his left upper extremity except for gross movements. (T-478) However, the Appeals Council disagreed with the ALJ's assessment of the Petitioner's emotional component. Specifically, the Appeals Council disagreed with the ALJ's conclusions that "claimant's systhmic disorder with anxiety only limit him to routine repetitive low stress tasks. He [ALJ] indicated that the Plaintiff [Petitioner] retained good concentration. The Council disagrees with this conclusion." (T-478)

Based upon the psychological evaluations of Dr. Duerr and Dr. George (the latter being issued on May 12, 1986), the Appeals Council concluded that the Petitioner's poor attentiveness and concentration was directly related to his pain and thus, imposed significant restrictions on his ability to perform sustained activities. (T-479) As a result, the Appeals Council found that beginning December 5, 1985 the emotional component of Mr. Lowery's claim which is directly related to his increased pain is the commencement of his disability, but not prior thereto.(T-479)

alternate positions and not requiring use of his left upper extremity except for gross movements. (T-478) However, the Appeals Council disagreed with the ALJ's assessment of the Petitioner's emotional component. Specifically, the Appeals Council disagreed with the ALJ's conclusions that "claimant's systhmic disorder with anxiety only limit him to routine repetitive low stress tasks. He [ALJ] indicated that the Plaintiff [Petitioner] retained good concentration. The Council disagrees with this conclusion." (T-478)

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Petitioner states that the Secretary's action of January 25, 1984 terminating the Mr. Lowery's benefits as of March, 1983 arbritrarily without any discussion, determination or finding relating to "a medical improvement" in Mr. Lowery's emotional condition is both arbritrary and capricious.[4] The consequences of the Respondent's refusal to follow existing law as defined in *Simpson vs. Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982) has created extreme hardships due to the improper and illegal termination of the Petitioner's benefits who has been deprived of the basic necessities and medical care.[5]

The Congressional rejection of the Respondent's actions in the early 1980's as codified in the Disability Reform Act of 1984,

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[4]Nationally, Social Security terminated the benefits of approximately 500,000 recipients between March, 1981 and April, 1984. *DeLeon vs. Secretary of Health and Human Services*, 734 F.2d 930, 931 n.1 (2nd Cir. 1984)

[5]Between 1980 and 1985, the number of court dispositions of denials or termination of benefits rose from 8,179 to 27,858 [*OFFICE OF HEARINGS AND APPEALS, OPERATIONAL REPORT-36*, September, 1985], and by 1985 there were more than 50,000 pending. [*OFFICE OF POLICY AND PROCEDURES, SOCIAL SECURITY ADMINISTRATION, COURT REMANDS: ANALYSIS AND RECOMMENDATION* 4 (December, 1987)]

Pub. L. No. 98-460, 98 Stat. 1805 [codified at 42 U.S.C. §423(f)(Supp. V, 1987)] has failed to significantly remedy the Petitioner's loss of benefits, especially as in this case, without any discernable legitimate interest in terminating the Petitioner's monthly disability benefits.

Neither the Secretary nor the courts below have explained how the Secretary's refusal to consider the Petitioner's prior psychiatric condition which lead *inter alia* in part to his prior disability application when the Respondent had legal notice of this condition with the award of Mr. Lowery's benefits in February, 1982.

The Petitioner recognizes that the scope of this review is very narrow, but also notes that given the fact that many other potential claimants may have been placed in the same helpless situation by the Secretary's failure to abide by existing case law, that this court's defining the breath of the Secretary's shield of discretion should be a worthy issue for review.

Petitioner suggests to this Court that at the minimum an individual adversely affected by government action must be notified of his right-

to challenge that action. See *Mullane vs. Central Hanover Trust Company*, 339 U.S. 306 (1950). Fundamental fairness requires that the government notify a losing claimant that their denial of benefits were not based upon a faithful execution of the laws, because neither the fact of non-acquiescence nor the existence of more favorable law is intrinsically obvious to the claimant who has been denied disability benefits. This type of notice is one of the requirements of due process law. *Jones vs. Califano*, 576 F.2d 12 (1978) Claimant's assume that their government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. *Bowen vs. City of New York*, 476 U.S. 467, 480 (1986) quoting *City of New York vs. Heckler*, 742 F.2d 729, 738 (11th Cir. 1984)

II.

The Secretary's Actions Have Deprived the Petitioner Due Process in His Administrative Proceedings

The application of due process to administrative proceedings is not novel. *Hannah vs. Larche*, 363 U.S. 420 (1960); *Alaska*

Roughnecks and Drillers Association vs. NLRB, 555 F.2d 732, 735 (9th Cir., 1977), cert. denied, 434 U.S. 1069 (1978)

The Social Security Act provide that each claimant has a right to a ***de novo*** hearing. 42 U.S.C. §405(b) and due process under the Fifth Amendment of the United States Constitution. *Fleming vs. Nestor*, 363 U.S. 603, 611 (1960)

In carrying out those dictates, the Secretary adopted 20 CFR §404.927 which provides, in relevant parts:

> The hearing examiner shall inquire fully into the matters at issue and shal received in evidence the testimony of witnesses and any documents which are relevant and material to such matters, ...the...procedure at the hearing generally...shall be at the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing. *Richardson vs. Perales*, 402 U.S. 389,400 (1971)

Petitioner alleges that this Court should consider this case as there has been a violation of the due process requirements for a full and fair hearing and the equal protection of law under the Fourteenth Amendment. *Morgan vs. U.S.*, 289 U.S. 468 (1936) It is well settled that

disability insurance benefits are subject to due process protections. *Matthews vs. Elridge*, 424 U.S. 319, 96 S.Ct 893, 47 L.Ed 2d 18 (1976)

As before, in the failure to abide by its own regulations and existing case law the Secretary has caused unjust discrimination to not only the Petitioner in this case, but also to many claimants who may have filed or may have been disallowed following an earlier denial. The Supreme Court has unequivocably stated that due process is not served unless an individual is given a reason for government action. In *Goldberg vs. Kelley*, 397 U.S. 254 (1970) this Court stated as follows:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injures an individual, and the reasonableness of the evidence of the action depends on the factfinding, **the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.** (emphasis added) 394 U.S. at 270, quoting *Green vs. McElroy*, 360 U.S. 474, 496-497 (1959)

An individual's interest and continued receipt of Social Security disability benefits is a statutorily created property interest which is

protected by the due process clause of the Fifth Amendment and is "entirely collateral to his substantive claim of entitlement". *Matthews vs. Eldridge*, at 329 (1976)

The Supreme Court described due process as "the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Matthews vs. Elridge*, supra; *Goldberg vs. Kelley*, supra, quoting *Armstrong vs. Manzo*, 380 U.S. 545, 552 (1965)

a. Unrepresented Claimant

Petitioner appeared without counsel at the administrative hearing of October 5, 1983 before the Honorable Nathan A. Bork, Administrative Law Judge.[6] Although the right to counsel may be waived, the Secretary has an obligation to notify the claimant of his right to counsel. *Cowart vs. Schweiker*, 662 F.2d 731,734 (11th Cir. 1981) Although Mr. Lowery has no constitutional right to counsel, he does have

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[6]The certified transcript filed by the Respondent fails to demonstrate that a Notice of Hearing is contained in the two (2) volumes of the certified transcript although the ALJ makes reference to same. (See T-1, List of Exhibits, B-1 through B-17, T-280-335)

the statutory right to have counsel represent him at the hearing if desired.[7] 42 U.S.C. Section 406; 20 C.F.R. Section 404.1700 et.seq. See *Smith vs. Schweiker*, 677 F.2d 826, 828 (11th Cir. 1982) Petitioner asserts that absent a transcript reference to a sufficient written notice of his statutory and constitutional rights to counsel, that a constitutional claim was present for the Court below to reopen the decision of January 25, 1984.[8]

b. No Medical Improvement

Absent any finding by the ALJ in his decision dated January 25, 1984 that there has been any "medical improvement" in Mr. Lowery's emotional problems, then under *Simpson* the Petitioner's benefits should have been continued, thereby raising a constitutional claim. *Simpson*, supra.

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[7]Half of the claimant's at administrative hearings do not have attorney representation. (*Participant Involvement in Request for Hearing Cases for Financial Year 1986*, 9 Soc. Sec. F., no. 3, at 7 (Mar. 1987) Social Security Forum is the official monthly publication of the National Organization of Social Security Claimants' Representatives.

[8]Note that there is no reference whatsoever by the ALJ to the issue of Petitioner's statutory right to have counsel represent him at the hearing.

This Court in the past has held that a claimant suffering from mental illness raises a colorable constitutional issue when he asserts that his mental illness precludes him from properly pursuing his disability claim. See *Elchediak vs. Heckler*, 750 F.2d 892, 894 (11th Cir. 1985) As in the *Elchediak* case cited above, the evidence of record in this case shows that Mr. Lowery has had mental illness severe enough to require hospitalization in November, 1981. (See Exhibit 28)

An additional factor which was not present in the *Elchediak* case was that in the instant action the Secretary was aware of Mr. Lowery's mental disability as it was part of the award of benefits in February, 1982 which the ALJ at that time noted would preclude Mr. Lowery from engaging in substantial gainful activity. Based upon the foregoing, the failure of the Respondent Secretary to notify the claimant of his right to counsel the lower Court was presented with a constitutional claim which defeated the application of **res judicata** and dictated the District Court to review the

prior decisions of the Respondent Secretary and award Petitioner his benefits with an onset of March, 1983.'

c. The ALJ failed to develop a full and fair record at the administrative hearing of October 5, 1983

The Petitioner submits that the record will show that the ALJ failed to develop a full and fair record at the administrative hearing of October 5, 1983 and such failure constitutes an additional colorable issue which required the Court below to exercise its judicial review and reopen the prior decisions of the administration and award Mr. Lowery benefits as of March, 1983.

At the administrative hearing of October 5, 1983 the record demonstrates reflects only seventeen (17) pages of transcript.

'Appellant submits that any res judicata defense was waived by the Secretary's failure to raise it in his Answer to Mr. Lowery's Complaint which was filed October 8, 1987. Res judicata must be plead as an affirmative defense. See Dellums vs. Powell, 566 F.2d, 167, 177 (D.C. 1977), cert. denied 438 U.S. 916, 98 S.Ct 3146, 57 L.Ed 2d 1161 (1978)

(T-43-60)[10] The ALJ is under an obligation to develop a full and fair record. *Clark vs. Schweiker*, 652 F.2d 399, 404 (5th. Cir. Unit B 1981), *Ware vs. Schweiker*, 651 F.2d 408, 414 (5th Cir. Unit A 1981), cert. denied 455 U.S. 912, 102 S.Ct. 1265, 71 L.Ed. 2d 452, (1982)

In *Kelly vs. Heckler*, 761 F.2d 1538, 1540 (11th Cir. 1985) a similar pattern of the events at the administrative hearing are shown. In *Kelly* the hearing lasted twelve (12) minutes and consisted of thirteen (13) pages of transcript from both the claimant and vocational expert's testimony. The Court held that the questioning by the Administrative Law Judge was less than totally satisfactory and that a recommendation of the ALJ to inquire further into the Appellant's medical problems and physical capacities would have been warranted. *Kelly*, 540.

As in *Kelly* Mr. Lowery is alleging

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[10]The record is silent as to how long the hearing actually lasted knowing only that the hearing was terminated at 2:13 p.m. (T-260) In the seventeen pages of transcript, three pages consist of the testimony given by the Vocational Expert, Steve Watson (T-57-60) with Mr. Lowery's testimony consisting of only fourteen pages.

colorable constitutional claims due to the fact that he was not represented by counsel and did not receive a full and fair hearing. Unlike *Kelly* Petitioner submits that there is a showing of prejudice and unfairness from his lack of counsel in the abbreviated hearing.

First of all, in February, 1982 Mr. Lowery was awarded benefits commencing in May, 1981 due to the residuals of his back surgery and mental illness.[11] Note Mr. Lowery was represented by counsel in the decision of February 16, 1982. (T-80; 283) Yet in the decision dated January 25, 1984 the Petitioner appeared without counsel and the record is silent as to whether or not he received proper written notice of his right to counsel.

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[11]As to the Appellant's continuing problems with mental illness, Appellant attached to his Brief of Appellant the case Compton vs. Sullivan, Civil Action No. 89-CV-1107-MHS, N.D. of Ga. decided on August 27, 1990 which is unrecorded and reproduced at Appendix H, 77a-87a relating to poor evaluation of mental illness by the ALJ, namely, the presence of occasional symptom free periods. See also Lebus vs. Harris, 526 F. Supp. 56, 61 (N.D. Calif. 1981) In Lebus the Court held that "while the mere existence of symptom-free periods may negate a finding of disability where a physical ailment is alleged, symptom-free intervals do not necessarily compel such a finding when a mental disorder is the basis of the claim".

Additionally, there was no questioning from the ALJ addressing the Petitioner's emotional condition which had been present in part and parcel of his underlying disability in the decision dated February 16, 1982. The ALJ failed to show any medical improvement in Mr. Lowery's physical condition since the award of benefits in February, 1982. Note that in between the Notice of Favorable Decision in February, 1982 and the adverse decision dated January 25, 1984 Mr. Lowery underwent an additional surgical procedure on his back, namely a lumbar fusion in September, 1982. Yet the prejudice towards Mr. Lowery is evident in that not only did the ALJ fail to document a medical improvement as required in *Simpson*[12] when it is obvious that the medical condition did not improve with the ensuing surgery in September, 1982. See *Simpson*, supra.

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[12]In Huie vs. Bowen, 788 F.2d 698, 703 (11th Cir. 1986) this Court noted that in cases following Simpson the Secretary refused to apply the medical improvement standard enunciated in Simpson except when directed to do so by a federal court in a specific case. See e.g. Pickett vs. Heckler, 608 F.Supp 841, 843 (D.C. Fla. 1985); Thomas vs. Heckler, 598 F.Supp. 492, 496 (M.D. Ala. 1984)

Under these circumstances, the Petitioner submits that the District Court had the obligation to invoke its authority to review the decision by the Respondent dated January 25, 1984, and reopen the Respondent's prior decision.

d. Earlier Judicial Notice and Review

Counsel for Petitioner notes that the District Court had already taken judicial notice of some of the constitutional claims alleged by the Petitioner. In the Magistrate's Report and Recommendation dated August 31, 1988 (which is unrecorded and reproduced at Appendix G, 70a), the Court notes among other things that "the Plaintiff had not been represented by counsel throughout the entire hearing procedure and Petitioner may have been unaware of what he needed to prove his case. Therefore, the Magistrate Judge found that the Plaintiff has met the three-prong standard of remand under *Cherry vs. Heckler*, 760 F.2d at 1192." See Appendix G, 70a *Cherry vs. Heckler*, 760 F.2d 1186 (11th Cir. 1987)

In addition, in addressing the argument relating to the failure of the ALJ to properly

protect the Petitioner's due process rights, counsel notes for the Court's attention on page 10 of the Report and Recommendation of August 1, 1988 the Court held

> Plaintiff also contends that this should be remanded for new Vocational Expert (VE) testimony because the VE was not presented with new hypothetical questions after Dr. Duerr's psychological report was put into evidence. The magistrate RECOMMENDS that a Vocational Expert be consulted if consideration of the new medical evidence and reconsideration of the psychological evidence should result in conclusions by the ALJ which would be the basis of new hypothetical questions which should be presented to a VE. (See Appendix G, 75a)

For this reason, the need for some guidance is necessary for this Honorable Court to ensure that Social Security continues to be fair to those who seek a continuation of their benefits.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari be granted.

CHARLES J. DURRANCE
COUNSEL OF RECORD FOR PETITIONER

CERTIFICATE OF SERVICE

I, Charles J. Durrance, a member of the bar of this Honorable Court, hereby certify that I have mailed three (3) copies of the Petition for Writ of Certiorari in the above-styled case to the following parties in a properly addressed envelope with adequate postage affixed thereon, addressed as follows, to-wit:

Honorable Sharon Douglas Stokes
Assistant United States Attorney
Suite 1800 - United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335

Honorable Dean Scott Landis
Assistant Regional Counsel
Office of General Counsel
6401 Security Boulevard, Room 642
Baltimore, Maryland 21235

Acting Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that I have served all of the parties required to be served.

This the 8th day of February, 1993.

CHARLES J. DURRANCE
COUNSEL OF RECORD FOR PETITIONER

Suite 125
1720 Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 874-0186

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8660
Non-Argument Calendar

D.C. Docket No. 1:87-CV-1420-ODE

FILED SEP 17 1992

JOHN LOWERY, III,

Plaintiff-Appellant,

versus

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(September 17, 1992)

Before TJOFLAT, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

Affirmed. See 11th Circuit Rule 36-1.

Costs are taxed against plaintiff-appellant.

Entered: September 17, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karen McNable/s/
Deputy Clerk

ISSUED AS MANDATE: NOV 24 1992

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8660

FILED NOV 12 1992

JOHN LOWERY, III,

Plaintiff-Appellant,

versus

LOUIS W. SULLIVAN, Secretary of
Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of

Appendix B

one of the members of the Court and a majority of the Ciruit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Elevebnth Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en bacn, and a majority of the judges in active service not having voted in facor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN LOWERY III	:	*FILED JUN 21 1991*
	:	
vs.	:	CIVIL ACTION NO.
	:	1:87-cv-1420-ODE
LOUIS W. SULLIVAN, Secretary of Health and Human Services:	:	

ORDER

This action for judicial relief from the final decision of Defendant Secretary of Health and Human Services ("the Secretary") to deny partially Plaintiff's claim for disability insurance benefits is before the court on Plaintiff's objections to the Magistrate Judge's Report and Recommendation. 42 U.S.C.§405(g), (416(i), 423(a). Specifically, Plaintiff contends that he was disabled prior to December 5, 1985, the onset date determined by the Secretary.

The Magistrate Judge succinctly relates the history of this case and the court incorporates that portion of the Report. For ease of reference, however, the court will summarize the procedural history of the case, quoting from the

Report. First, Plaintiff was awarded benefits with an onset date of may, 1981, "due to residual of back surgery. [On] January 25, 1984, [f]ollowing notice and a hearing, the Secretary ended plaintiff's benefits effective May, 1983 based on a medical improvement in plaintiff's condition." Plaintiff did not appeal this adverse decision which became final. "On September 10, 1985, plaintiff filed a new applciation for the same benefits. This application was denied initially and upon reconsideration," leading to a May 2, 1986, hearing before an Administrative Law Judge ("ALJ"). The ALJ denied benefits on September 9, 1986.

Plaintiff then filed this suit, and the district court remanded to the Secretary. A second applciation for benefits was filed and denied, leading to a second suit in this court. The two suits were consolidated on the remand to the Secretary. The ALJ held a hearing on August 31, 1989 and issued a decision denying benefits on May 25, 1990. The Appeals Council reversed, concluding that the Plaitniff is entitled to

benefits with an onset date of December 5, 1985, due to a combination of physical and psychological impairments. "With respect to the period prior to December 5, 1985, however, the Appeals Council adopted the recommended decision of the ALJ."

This suit was subsequently reopened by Plaitniff and oral argument and briefs were submitted to the Magistrate Judge. The Magistrate Judge reports that the Appeals Council's decision not to award benefits prior to December 5, 1985 is supported by substantial evidence and recommends dismissing this complaint.

Plaintiff objects to the Magistrate Judge's Report and Recommendation on three stated grounds. First, Plaintiff objects that he erred in not recommending that the court reopen the Secretary's January 25, 1984 termination of benefits retroactive to may, 1983. Plaintiff cites cases for the proposition that where a claimant can show constitutional error, the finality of an administrative decision doe snot bar the court from reopening it. E.g., Brown vs.

Sullivan, 921 F.2d 1233, 1237 (11th Cir. 1991) This argument, however, was not raised before the Magistrate Judge. The court, therefore, declines to address this argument because it was untimely raised.

Plaintiff's second objection concerns the ALJ's finding in regards to pain. The Magistrate Judge refused to address this issue becasue the Appeals Council had reversed the ALJ, thereby refusing to adopt the ALJ's factual findings. Plaintiff points out, however, that the Appeals Council did adopt the ALJ's finding in regards to the Plaintiff's pain, stating:

> The Administrate Law Judge held that the claimant had the ability to do sedentary work allowing him to alternate positions and not requiring use of his left upper extremity except for gross movements. The Appeals Council agrees with this physical assessment.

(Administrative Record, p. 478) Although, as the Magistrate Judge states, the Appeals Council becomes the factfinder when it reverses the ALJ, Graham vs. Bowen, 790 F.2d 1572, 1574, n.2 (11th Cir. 1986), the Appeals Council did not reverse the ALJ on the issue of physical assessment.

Where the Appeals Council affirms the ALJ, the ALJ is the factfinder whose assessment must be supported by substantial evidence.

Plaintiff first argues that the ALJ incorrectly discounted the opinion of his treating physician, Dr. G. Lee Cross. Dr. Cross examined Plaintiff in 1988 and wrote a letter which indicates that Plaintiff suffers pseudoarthritis in the lower back. Prior to that time, Dr. Cross had not seen Plaintiff since 1983 when he reported that Plaintiff was getting better and that the fusion surgeryhe had performed "look[ed] solid." Therfore, Plaintiff contends that the ALJ has accorded significant weight to the 1988 opinion of Dr. Cross, a treating physician. See, MacGregor vs. Bowen, 786 F.2d 1050, 1053 (11th Cir. 1986). Dr. Cross' opinions, however, relate to an earlier and a later period than the one in question. ALthough Plaintiff represents that Dr. Cross' April 4, 1988 letter indicates that in his opinion Plaintiff's "pseudoarthritis probability (sic) never healed since the first spinal surgery in May, 1981 and the subsequent surger in September,

1982," Plaintiff's Objections, p. 19, the letter sets forth no such opinion. Rather, the letter relates only to Dr. Cross' opinion as to the Plaintiff's present situation and his prognosis. (R-843-44) The next medical opinion on the record, that of consultative physician, Dr. Merton A. Shure, cam in November, 1986. Dr. Shure opined that Plaintiff, although restricted in his activities, could do sedentary type work. (R. 504) Thus, the ALJ was not faced with the relevant opinion of a treating physician.

Plaintiff also contends in this regard that the ALJ incorrectly applied the "pain standard."

> This court has established a three-part "pain standard" that applies when a claimant attempts to establish disabiliyt through his or her own testimony of pain or other subjective symptoms. The pain standard requires (1)evidence of an underlying medical condition and either (2) objective evidecen taht confirms the severity fo the alleged pain arising from that condition or (3) that the obejctively determined medical condition can reasonably be expected to give rise to the alleged pain.
>
> The claimant's subjective testimony supported by medical evidence that satisfies the standard is itself sufficient to support a finding of disabiliyt. If the Secretary decides not to credit such testimony, he must

> discredit it explicitly, and articulate explicit and adequate reasons for doing so. Failure to articulate the reaons for discrediting subjective pain testimony requires, as a matter of law, that the testimony be accepted as true.

Brown, 921 F.2d at 1236 (citations omitted).

Plaintiff contends that the ALJ improperly discounted subjected evidence of Plaintiff's pain. Assuming for the moment that Plaintiff did present such subjective testimony for the relevant time period, Plaintiff still fails to present any "objective medical evidence" which either confirms his complaints of pain or evidences a condition "of such severity that it can be reasonably expected to give rise to the alleged pain" for the period in question. The ALJ pointed out this lacuna and also noted that Dr. Shure had found Plaintiff's ocmplaints of pain to be embellised. Furthermore, the ALJ note that Dr. Cross' examination in 1983 had bnot shown a serious condition. The ALJ also discussed the lack of any indicationon the record that Plaintiff sought treatment for pain or back problems during the period in question, despite having been to the hospital in March, 1985 for an

abscess on his cheek. Thus, the ALJ articulated his reasons for partially discrediting Plaintiff's testimony of disabling pain, and the record does not reveal objective medical evidecen sufficient to satisfy the second or third parts of the pain standard. Consequently, the ALJ's decision, as adopted by the Appeals Council, that Plaitniff could do some sedentary work, is supported by substantial evidence.

Plaintiff objects thirdly that th Magistrate erred in concluding that substantial evidecen on teh record supports the Appeals Council's finding taht Plaitniff's emotional problems commenced on Decmeber 5, 1985. The Appeals Council's decision is based on the lack of medical data for the period between 1983 and December 5, 1985. It is at that tdate that the first renewed medical signs of Plaintiff's pain show up. On that basis, reasoning that Plaintiff's emotional problems are related to hi pain, the Appeals Council found that December 5, 1985 was the appropriate onset date.

Subjective testimony concerning psychological disturbances are evaluated under

the same three part test used in evaluating subjective pain testimony concerning pain. Brown, 921 F.2d at 1236 (dicta). Plaintiff objects that the Appeals Council did not discuss the irritable demeanor of Plaintiff at the hearings in October, 1983, May, 1986, and January, 1989. Plaintiff faults the Appeals Council for discussing solely the reports of Drs. George and Duerr, who performed psychological evaluations of Plaintiff in 1986.

For the period in question, Plaintiffs' mental state at only the October 1983 hearing is relevant. Although Plaintiff contends that this transcript evidences Plaintiff's irritability and shortness of temper, he provides no citations. The court's review of the transcript reveals no flashpoints. To be sure, Plaintiff's responses at the later hearings (in 1986 and 1989) show irritability, but there is none evident at the earlier, relevant hearing. Plaintiff also has not identified any later subjective testimony asserting that the psychological problems extended back to the period of 1983 to 1985. Thus, although Plaintiff argues about subjective

lay testimony, he has failed to point out, either in his objections or in his initial brief before the Magistrate Judge, relevant lay testimony for the period March 1983 through December 1985.

Moreover, Plaintiff provides no objective medical evidence regarding an underlying medical condition at that time which woul dexplain any emotional problems. See, Brown, 921 F.2d at 1236., Thus, not only is there no subejctive testimony regarding emotional problems on the record, but there is also no medical evidence confirming them nor any which would reasonably be expected to cause such problems. The Appeals Council pointed out this lacuna and based the onset date on it. Consequently, the Secretary's decision that Plaintiff's disability, which is a combination of physical pain and psychological disturbances, commenced on Decmeber 5, 1985 is supported by substantial evidence.[1]

Accordingly, Plaintiff's objections to the

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[1]Plaintiff also presses his consitutional attack on the Secretary's January 25, 1984 decision in regardds to the psychological component of Plaintiff's disability. As the court stated above, however, Plaintiff's failure to raise that arguemtn before teh Magistrate precludes its consideration on review of the Magistrate's Report and Recommendation.

Magistrate Judge's Report and Recommendation are OVERRULED, and the court AFFIRMS the Magistrate's Report and Recommendation and DISMISSES the complaint.

SO ORDERED, this 21 day of June, 1991.

Orinda D. Evans/s/
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN LOWERY III	:	*FILED MAR 18 1991*
Plaintiff,	:	
v.	:	CIVIL ACTION
LOUIS W. SULLIVAN, M.D., Secretary of Heath and Human Services	:	NO.1:87-cv-1420-ODE
Defendant.	:	

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff brings this action pursuant to 42 U.S.C. §405(g) to obtain judicial relief from the final decision of the4 Secretary of Health and Human Services which rendered a partially adverse ruling to his request for a period of diability and Disability Insurance Benefits (DIB) under 42 U.S.C. §416(i) and 423(a). The specific issue is whether plaintiff became disabled before December 5, 1985.

Plaintiff previously was awarded DIB with an onset date of May, 1981, due to residual os back surgery. (Record, hereinafter R., 281-83). Following notice and hearing, the Secretary ended plaintiff's benefits effective May, 1983 based on

medical improvement in plaintiff's condition. (R-43-60, 336-41).

On September 10, 1985, plaintiff filed a new application for the same benefits. (R-352-55) This application was denied initially and upon reconsideration. (R. 356-57, 359-60) On May 2, 1986, a de novo hearing was held before an Administrative Law Judge (ALJ), who denied the plaintiff benefits on September 9, 1986. (R. 61-97, 12-21) The Appeals Council concluded that there was no basis for granting plaintiff's request for review. (R.4-5) Plaintiff then filed a complaint in district court (Civil Action No. 1:87-cv-1420-ODE). On Cctober 6, this court remanded the case to the ALJ for de novo consideration in light of the recommendation of the undersigned magistrate judge.

Plaintiff filed a second application for period of disability and DIB on October 27, 1986. Following an administrative hearing, the ALJ rendered an adverse decision which was affirmed by the Appeals Council on August 11, 1988. In an Order dated October 26, 1988, the Appeals Council, on its own motion, consolidated the

claims folders on the applications filed in September, 1985 and the subsequent applications filed in October, 1986, and remanded the claims for further proceedings by the ALJ. Pursuant to the order of the Appeals Council, an administrative hearing was held on January 21, 1989, when the ALJ head testimony by witnesses, including a Vocational Expert (VE). (R. 609-39)

Unaware that the Appeals Council had consolidated the claims, plaintiff filed a second civil action in the district court (Civil Action No. 1:88-cv-2450-ODE) on October 26, 1988. The Secretary filed a Motion to Remand on February 17, 1989, noting that since the facts and law in Civil Action No. 1:87-1420 and in Civil Action No. 1:88-cv-2450 are either identical or interrelated, these claims should be considered together. The undersigned magistrate judge entered a Report and Recommendation on July 21, 1989, recommending that defendant's Motion for Remand be granted in the interest of judicial efficiency. Despite plaintiff's objections, the district court adopted the Magistrate's Report and Recommendation and granted defendant's Motion

to Remand on October 5, 1989.

Following the January, 1989 hearing, an adverse decision was issued by the ALJ on August 31, 1989. (R. 499-511) Thereafter, plaintiff's counsel filed objections to the ALJ's decision, and a new decision was rendered by the Appeals Council on May 25, 1990. (R. 476-79) The Appeals Council concluded that plaintiff is entitled to a period of disability and to DIB beginning on December 5, 1985. With respect to the period prior to December 5, 1985, however, the Appeals Council adopted the recommended decision of the ALJ.

On July 18, 1990, plaintiff filed a Motion to Reopen the case at bar in the district court. The court entered an Order granting plaintiff's Motion to Reopen on September 10, 1990. Oral argument was held before the undersigned magistrate judge on December 17, 1990. This case is currently before the magistrate judge on the parties' pleadings, briefs, and oral arguments.

The final decision of the Secretary in this case is the Appeals Council's decision dated May

25, 1990, which found plaintiff disabled as of December 5, 1985 due to his combined physical and mental limitations. (R. 478-79) The Appeals Council disagreed with the ALJ's conclusion that plaintiff's dysthmic disorder with anxiety only limited him to routine repetitive low stress tasks, and it concluded that plaintiff's poor attentiveness and concentration impose significant restriction on plaintiff's ability to perform sustained activity. Based on the testimony of the VE, the Appeals Council found plaintiff to be under a disability as defined in the Social Security Act. Although the first evidence of a mental impairment related to plaintiff's pain is a psychological report prepared by Dr. George on May 12, 1986, the Appeals Council noted that plaintiff was seen in a clinic on December 5, 1985 because he was nervous, dazed, and in pain. The Appeals Council explained its decision as follows: "Since the psychological reports show a direct correlation between the claimant's pain and his depression, the Council finds it reasonable to relate the dysthmic disorder back to December 5, 1985." (R.

479)

Plaintiff, however, argues that he has been disabled since January 26, 1984. (Plaintiff's Brief, p. 2) Indeed, at the hearing held in December of 1990, plaintiff's counsel argued that there is a colorable issue to reopen plaintiff's case to March, 1983, when plaintiff's original benefits ceased.

The Social Security Act provides that federal courts may only review the Secretary's "final decision". 42 U.S.C.§405(g). See also, Parker v. Bowen, 788 F.2d 1512, 1516 (11th Cir. 1986) This court's function in reviewing the final decision of the Secretary is not to try the case de novo nor to reweight the evience. Rather, it is to determine whether there is substantial in the record, considered as a whole, to support the Secretary's findings and whether proper legal standards were applied to the fact-finding process. 42 U.S.C. §(g); Walden v. Schweiker, 672 F.2d 835 (11th Cir. 1982); Davis v. Schweiker, 641 F.2d 283 (5th Cir. 1981) The Secretary's findings must be sustaine dif supported by substantial evidence and proper

legal standards were applied. Substantial evidence means such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion". NRLB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939); Bloodsworth v. Heckler, 703 F.2d 1233, 1239 (11th Cir. 1983) The claimant bears the burden of demonstrating that the final decision of the Secretary is nor supported by susbtantial evidence. Flynn v. Heckler, 768 F.2d 1273, 1274 (11th Cir. 1985)

Pursuant to 20 C.F.R. §404.981, the decision of the Appeals Council is the "final decision" of the Secretary. Bloodsworth v. Heckler, 703 F.2d 1233, 1237 (11th Cir. 1983); Sheppeard v. Heckler, 760 F.2d 1253, 1254 (11th Cir. 1985); Parker v. Bowen, 788 F.2d at 1516. In the case at bar, the Appeals Council granted plaintiff's request for review and issued the final decision of the Secretary. Although plaintiff complains in his Brief that the ALJ incorrectly evaluates the level of severity of plaintiff's emotional condition and that the ALJ improperly evaluated plaintiff's subjective complaints of pain, the

district court need not address these arguments since it is the decision of the Appeals Council, not the ALJ, that constitutes the final decision of the Secretary. In cases where the Appeals Council reverses an ALJ's decision, judicial review is limited to determining whether the Appeals Council's decision is supported by substantial evidence. See Graham v. Bowen, 790 F.2d 1572, 1574 n.2 (11th Cir. 1986) See also, Parker v. Bowen, 788 F.2d 1512; Scott v. Bowen, 808 F.2d 1428 (11th Cir. 1987) Thus, the only issue in this case is whether there is substantial evidence to support the Appeals Council's decision to commence benefits on December 5, 1985 rather than on an earlier date.

The magistrate judge CONCLUDES taht the record contains substantial evidence to support plaintiff's disability as of Decembre 5, 1985. The Appeals Council discusses the psychological report prepared by Dr. Duerr in July of 1986 (R. 460-67, 478), who found that plaintiff had developed a dysthymic disorder with anxiety as a reaction to his pain and restricted activity. (R.465) The Appeals Council found this

assessment to be consistent with the other evidence of recordd, including the psychological evaluation by Dr. George on May 12, 1986. (R.451-59) Based on a visit to an outpatient clinic at Grady Memorial Hospital (R.815), the Appeals Council found it reasonable to relate plaintiff's dysthmic disorder back tot he date of this visit on Decembr 5, 1985. (R-479)

While Plaintiff notes in his brief that the severity of plaintiff's emotional problems is clearly evidenced in light of the threee psychological evaluations (R. 460-67, 450-59, 828-34), it was upon these evaluations that the Appeals Council's decision fails to evaluate plaintiff's testimony regarding his emotional component and to note his irritability and shortness of temper displayed at the hearing in January, 1989. (Plaintiff's Brief at p. 18) The magistrate judge CONCLUDES, however, that plaintiff's testimony and demeanor at a 1989 hearing would not provide substantial evidence for an onset date prior to December 5, 1985.

At the hearing in Decmeber of 1990, plaintiff's counsel argued that plaintiff's

emotional impairment predated December of 1985, noting in particular that plaintiff was hospitalized in a psychiatric hospital in 1981. (R.428) At that time, plaintiff's "psychiatric consultation indicated depression probably related to the pain syndrome". (Id.) The Appeals Council found plaintiff to be disabled due to a combination of physical and mental impairments, however, and plaintiff is unable to point out any medical evidence to support his allegation that an earlier onset date would be appropriate. The Appeals Council agrees with the ALJ that "there is a paucity of evidence after November, 1983." (R.479) Indeed, when plaintiff was seen in the Grady Emegency Room in December 1985 complaining of low back pain, those hospital records report that plaintiff's condition had deteriorated only in the last month. (R. 811)

Plaintiff has failed to carry his burden of demonstrating that the Appeals Council's conclusion is not supported by substantial evidence. As the Secretary notes, the question is not whether some other date might be supported by substantial evidence. Even if plaintiff

produced evidence supporting a different onset date, which he did not, the finding of an onset date of Decmeber 5, 1985 must be affirmed because substantial evidence supports the finding. Harwell v. Heckler, 735 F.2d 1292, 1293 (11th Cir. 1984) The Secretary has issued a written decision explaining in detail how an onset date of Decmeebr 5, 1985 was selected. Furthermore, the Appeals Council recited with particularity the evidence in the record supporting that decision, including psychological evaluations of plaintiff and other medical evidence.

RECOMMENDATION

Accordingly, the magistrate judge CONCLUDES that proper legal standards were applied in this case. The Secretary's decision is supported by substantial evidence and should be AFFIRMED. This complaint should be DISMISSED.

SO REPORTED AND RECOMMENDED, this 18th day of March, 1991.

John E. Dougherty/s/
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
MAR 19 1991

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
JOHN LOWERY, III	Period of Disability and Disability Insurance Benefits Supplemental Security Income
Claimant	258-92-9008

The United States District Court for the Northern District of Georgia remanded this case (Civil Action No. 1:88-CV-2450-ODE) to the Secretary of Health and Human Services for further administrative action. Thereafter, the Appeals Council remanded the case to an Administrative Law Judge.

On August 31, 1989, a recommended decision was issued to whcih exceptions have been received.

However, the Administrative Law Judge held that the claimant had the ability to do sedentary work allowing him to alternate positions and not requiring use of his left upper extremity except

Appendix E

for gross movements. The Appeals Council agrees with this physical assessment.

However, the Administarative Law Judge also found that the claimant's dysthymic disorder with anxiety only limited him to routine repetitive low stress tasks. He indicated that the claimant retained good concentration. The Council disagrees with this conclusion.

The psychological report by Dr. Duerr cited by the Administrative Law Judge indicated that the claimant showed good concentration, pace, and persistence when doing a task, but for no more than five to ten minutes at a time. He needed to change position frequently at ever shortenting intervals due to pain and appeared visably exhausted at the end of three hours. The claimant had developed a dysthymic disorder with anxiety as a reaction to his pain and restricted activity. The prognosis was poor without relief of his pain. The Council finds that this assessment in consistent with the other evidence of record, including the psychoogical report by Dr. George on May 12, 1986. There is no contrary evidence. Whether the claimant's poor

attentiveness and concentration are directly due to pain experienced on aphysical basis or are due to the effects of his dysthymic disorder and anxiety, the Council finds that they impose a significant restriction on his ability to perform sustained activity. The vocational expert testifed that, based on the results of this evaluation, the claimant was unable to do any job because he could not do sustained work activity. Thus, the Council finds the claimant is under a "disability" as defined in teh Act when considering his combined physical and mental limitations and the vocational expert's testimony within the framework of Rule 201.27.

However, the first evidence of a mental impairment related to his pain is the psychological report of May 12, 1986. As noted by the Administrative Law Judge ther is a paucity of evidence after November 1983, but on December 5, 1985 the claimant was seen in a clinic because he was "nervous, dazed and in pain" (Exhihibit D-26). On December 19, 1985, he was seen again for low back pain which had been increasing over the past month. The Council concludes that these

notations show increasing pain. Since the psychological reports show a direct correlation between the claimant's pain and his depression, the Council finds it reasonably to relate dthe dysthymic disorder back to December 5, 1985, but not prior thereto. Before then the Council agrees with the Administrative Law Jude that the claimant retained the residual functional capacity to do the jobs of advertising clerk as he had done in the past. Additionally, the vocational expert testified that there were other clerical jobs the claimant could do which existed in significant numbers in the national economy. Considering these factors within the framework of Rule 201.27, a finding of "not disabled" is supported by the preponderance of the evidence for the period prior to December 5, 1985.

Therefore, the Appeals Council adopts the recommended decision, with respect to the period prior to December 5, 1985 and further holds that, based on the application filed on September 10, 1985, the claimant is entitled to a period of disability commencing on December 5, 1985, and to disability insurance benefits under the

provisions of sections 216(i) and 223, respectively, of the Social Security Act, as amended.

It is the further decision of the Appeals Council that, based on the application filed on September 10, 1985, the claimant has been disabled under section 1614(a)(3) of the Social Security Act, beginning December 5, 1985.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements, and if eligible, the amount and the month(s) for which payment will be made.

Appeals Council

Harriet A. Simon
Member

signature eligible
Member

DATE: MAY 25 1990

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

RECOMMENDED DECISION

In the case of	**Claim for**
JOHN LOWERY,III	Period of Disability and Disability Insurance Benefits Supplemental Security Income
Claimant	258-92-9008

PROCEDURAL HISTORY

This case is before the Administrative Law Judge upon Order of Appeals Council Remanding Case to the Administrative Law Judge dated October 26, 1988. Such order referred to the Order of the Unite States District Court for the Northern District of Goergia issued October 6, 1988 adopting the report and recommendation of a magistrate issued August 1, 1988. The report of the magistrate, specifically considering a decision of another Administrative Law Judge on an application of the claimant for the benefits claimed, recommended remand of the case for consideration of new medical evidence and also for proper consideraion of new medical evidence

and also for proper consideration of the claimant's emotional problems. The recommendation also called for new vocational testimony as appropriate. The Order of the Appeals Council specifically directed that this Administrative Law Judge consider the claimant's status under applications filed in September 1985 and October 1986. This Administrative Law Judge, in accordance with the Appeals Council's Order, has attempted to complete the administrative record with current evidence of the claimant's medical status from treating and examining source, in addition to consideration of the evidence in accordance with the criteria as directed in the Court Order. This Administrative law Judge has prepared this recommended decision based upon all the evidence of record as documented in the List of Exhibits, all testimony at the claimant's hearings, and all arguments presented.

ISSUES

The general issues are wether the claimant is entitled to a period of disability and disability insurance benefits under section

216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a(3)(A) of the Act. The Social Securtiy Act defines "disability" as the inability to engage in any substantial gainful activity due to physial or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Prsuant to the Act, the Secretary has established Regulations No. 4 and No. 16. The Regulations provide steps for evaluating disability (20CFR 404.1520(a) and 416.920(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being

found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

Social Security Administration Regulations No.4 and No. 16 require the Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b) and 416.920(b));

2. An individual who does not have "severe impairment" will not found to be "disabled" (20 CFR 404.1520(c) and 416.920(c));

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix I" of Subpart P of Regulations NO. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d) and 416.920(d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made (20 CFR 404.1520(e) and 416.920(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f) and

416.920(f)).

The rules set our in Appendix 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20CFR 404.1545 and 416.945). If a finding of disabled cannot be made based on strength limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability". In cases where the individual has solely as nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

The evaluation process descirbed above applies to both physical and mental impairments. In addition, the regulations require the

Administrative Law Judge ro follow a special procedure when evaluating the severity of mental impairments. This special procedure requires the use of the form appended to this decision in all cases in whcih a mental impairment has been found to exist (20 CFR 404.1520a and 416.920a).

The form is sused to list the signs, symptoms and other medical findings which are recorded in one or more subsections in section III ofthe form. These subsections correspond to the paragraph A criteria for the categories of mental disorders in Appendix I of Subpart P, Regulations No. 4 , and are known as the "A" criteria.

The form is also used to rate the degree of functional loss resulting from the documented mental impairment(s). There are four areas of function which have been found especially relevant to the ability to work and which correspond to the paragraph B criteria of most of the mentl disorders listed in Appendix I; hence, they are known as the "B" criteria. These areas are: activities of daily living; social functioning; concentration; peristence and pace;

and deterioration or decompensation in work or work-like settings. The rating for each of these four areas is compared with the crieteria set forth in the regulations for determining the severity of the mental impairment.

The first area of the "B" criteria, "activities of daily living", includes adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for grooming and hygiene, using telephones and directories, using a post office, etc.

The second area of the "B" criteria, "social functioning", refers to an individual's capacity to interact appropriately and communicate effectively with others.

The third area of the "B" criterion, "concentration, persistence and pace", refers to the ability to sustain focused attention suficiently long to permit timely completion of tasks commonly found in work settings.

The last area of cuntion evaluated under the "B" criteria is deterioration or decompensation in work or work-like settings. This refers to

repeated failure to adapt to stressful circumstances which cause the individual either to withdraw from that situation or to experience an increase of signs and symptoms with an accompanying difficulty in maintaining activities jof daily living, social relationships, and/or maintaining concentration and task persistence.

As noted in the Order of Remand, the current applications under consideration by this Administrative Law Judge were filed on September 10, 1985 and on October 27, 1986, with a protective filing date for purposes of supplemental security income benefits of October 24, 1986. The current evidence indicates the claimant's current alleged onset date is January 26, 1984, with the claimant alleging disability to his back injury. A review of the claimant's current earnings record reveals he met the special earnings requirements for coverage under the Act on his alleged onset date, based upon a preivous closed periord of disability, and that he continued to meet the requirements through September 30, 1986, but not thereafter. Thus order for Mr. Lowery to establish his eligibility

for a period of disability and for disability insurance benefits, he must establish he was "disabled" within the meaning of the Social Security Act on or before September 30, 1986, the date he last met the special earnings requirements and was last insured under the Act. The claimant's elibility for supplemental security income benefits is not controlled by his disability insurance benefits insured status.

The evidence is clear that Mr. Lowery is a younger individual. He was born July 4, 1954, and has been in his 30's at all times in qustion. Mr. Lowery completed a high school education. The evdience shows Mr. Lowery retains the ability to read, write and generally function normally in society, though the Administrative Law Judge does acknowledge some references to deterioration in hi intellectual capacity in psychological evaluatuions. However, Mr. Lowery acknowledges, at all times questioned, the ability to read reasaonably, write and generall6y fucntion reasonably normally consistence with his educational level. The Administrative Law Judge finds the claimant retains the capacity to

function at such educational level. Mr. Lowery has past relevant work experience as an order puller in a warehouse, as a telephone lineman, and as a advertising clerk in the music business. The Administrative Law Judge, after review of the evidence, finds no evidence Mr. Lowery has engaged in substantial gainful activity since his current alleged onset of disability, and continuing through the date of this decision.

Medcial evidence, as documented in the previous decisions, clearly establishes the claimant suffers with a number of "severe" impairments within the meaning of the Social Security Act. These involve sever post surgical low back syndrome; anxiety and depression associated with his health situation and his change in lifestyle; and more recent evidence of cercvical spine problems, with complaints of limitations in use of the left upper extremity. The Administrative Law Judge notes his own decision concerning the claimant's disability status for a psecific period, issued January 29, 1988. Such decision apparently was not considered by the magistrate or the court, but

was vacated in the Order of the Appeals COuncil in order to allow full consideration of the claimant's diability status for the entire period in question. However, this Administrative Laww Judge notes such decision fully and accurately portrayed the claimant's medical history and status through the date of such decision, and this Administrative Law Judge adopts such decision herein by reference thereto, as if copied in full.

Mr. Lowery suffers with severe low back problems which haverequired multiple surgeries in the past. Mr. Lowery's treating physician in he past has been Dr. G. Lee Cross. However, apparently Dr. Cross dismissed Mr. Lowery after his multiples surgeries, with Dr. Cross' notes showing Mr. Lowery was last seen in the fall of 1983 because of right posterior illiac bursistis. Prior to such November treatment, the doctor, in earlier 1983, found the claimant had some back discomfort once in a while, but felt he is getting better. He will start school in the near future (report dated March 1983). Flexion extension lateral films and an AP filem of his

lumbar spine show that his L5 to the sacrum fusions looks solid". The doctor later noted the claimant planned to go to school in the fall, and the claimant's low back pain and leg pain was felt to be secondary to periural scarring. Apparently the claimant did well, since the next notes from Dr. Cross are dated April 4, 1988.

After Dr. Cross last saw the claimant for his back problems in 1983, the claimant did not regularly receive such treatment according to the record. The Social Security administration ordered a consultative examination, which was performed by Dr. Merton A. Shure in November 1986. While the doctor noted the claimant moved about with a certain degree of care and caution, the claimant was able to function reasonbaly, getting on and off the examining table without any great difficulty, through he did evidence some discomfort. tHe doctor's opinion was that "there was a certin amount of embellisment. Some of the (claimant's) responses were somewhat excessive and inappropriate." The doctor found the claimant's back was healed well, with no greater than very light spasm found. There was

marked restriction of lumbar motion, and straight leg raising was positive. Neurological exam of the lower extremity showed reflexes absent, but no sensory deficity and no muscle weakness. X-rays showed a solid usion. The doctor opined: "The fusion is completely solid". The doctor did not find a reasonable medical explanation of the claimant's apparent embellishment. The claimant had previously been orthopedically on a consultative basis by Dr. Robert T. Willingham in October 1985. The doctor's opinions were much the same as Dr. Shure particularly finding the solid fusion to the back. Again, while acknowledging the severe nature of the claimant's procedures, and also acknowledging the claimant is restrictred from the heavier type work he may have done at some of his past relevant work activities involving heavy bending and lifting, the doctor indicated the claimant should be able to do sedentary type work".

Other notes of the claimant's medical treatment recently for his back pain and problems come from the Grady Memorial Hospital. Thse notes at Exhibit D-26 show very infrequent

problems. In March 1985 the claimant complaint of an abcess on his cheek, which was treated, but it was specifically noted there were no complaints of severe or debilitating pain associated with the claimant's condition. Nor was he complaining, at that time, apparently, of any back problems. In December, 1985 the claimant was seen in the emergency rroom complaining of low back pain, and underwent a workup. However, it was noted the claimant had had his pain for an extended period and apparently was dealing with such. X-rays of the cervical spine showed some narrowing, but no severe or significant abnormalities. It was specifically noted in the reports that the claimant's condition had very recently deteriorated. Though complaining of increasing low back pain over the last two years (prio to December 1985), the particular problems were within the last two months (October and Noember 1985). But upon physical examination the lower extremities showed normal strength, the senses were intact, and tehre were difficulties in eliciting reflexes. The claimant was given medication for relaxation. The next notes comes

from December 1986 (one year later). At that time the claimant was complaining of left arm numbness and tingling, and cervical myelogram was performed. There was no complaint of dizziness or of back discomfort at the time the procedure was performed. His status was evaluated as stable, and the findings were characterized as "not impressive" The claimant apparently was to be treating conservatively with medication therapy, and there was no indication of abnormalities precluding function, with the claiamnt's strength 5/5 throughout, able to walk toe and heel, and with reasonable coordination.

In contrast to the very limited evdience of treatment on a sustaine dbasis and released by the doctor in 1983, Dr. Cross apparently again began seeing the claimant in April, 1988. At that time the claimant was complaining of misery due to back pain and hip and leg pain, and also noted a history of neck pain and numbness in the left arm. But upon examination in April 1988 the doctor found almost normal cervical spinal motion, and sensory and motor function in the upper extremities was intact. There was again

marked restriction of motion in the lumbar spine, consistent with that previously noted. Some reflexes were absent, though motor function of the lower extremities was intact. There was some cervical disc degenerations noted at C5-C6, and the doctor, while acknowledging the claimant's fusion was solid at L4-L5, found suggestions of pseudarthrosis at L5-S1 upon x-rays. The doctor went on to note that various views were inconclusive, and characterized the condition as symptomatic pseudoarthrosis at L5-S1, in addition to degenerative disc disease. He gace the clauimant a prescription for medication in May 1988 but then did not see the claimant again until September, 1988. The doctor, in his notes does not show giving a full examination to the claimant after the April 1988 visit, apparently more concerned with complainign about "the administrative bureaucracy with regard to t(the claimant) getting his social security gets more and more complex and moves more slowly by the day". The doctor indicated that with pain medciation the claimant's condition could be brought under control, through the doctor looked

forward to the claimant's treatment with surgery. The doctor also confirmed, as he saw the claimant every few months though approximately February 1989, that neurologically the claimant was intact and that the claimant had nonphysiologic complaints concerning his pains in the back and leg, and with a significant psychological component.

The Administrative Law Judge has considered the claimant's complaints of pain and discomfort, noting that pain may be a disabling factor. However, it is no th emere existence of pain which is determinative in a disability evaluation, but rather the extent to which an individual is limited thereby. And the claimant's pain must be considered at each step in the sequential evaluation process in accordance with the crieteria as enumerated in Social Secruity Ruleing 88-13. In this particular case particular attention must be given to the notes of the claiamnt's treating physician, Dr. Cross. However, the Administrative Law Judge is not controlled by the conclusions of Dr. Cross, particuarly when such

are not fully supported by the medical evidence. The Administrative Law Judge particuarly notes Dr. Cross' status in the past as the claimant's treating physician, his release of the claimant, and his only recent return to treatment of the claimant, with evidence onf only one full recent exam o the claimant and the doctor's apparent greater concern for the difficulties with the claimant getting his Social Scurity benefits than continuing to treat the claimant. The Administrative Law Judge further notes the contrast between Dr. Cross' characterization of the claimant's problem as symptomatic pseudoarthrosis at L5-S1, and all other reports of evaluations of the claimant's back which have not been impressive and which have consistently shwon full and solid fusion. Further the Administrative Law Judge notes the very limitd evidence of regular or sustained treatment of the claimant for complaints which might be expected to be associated with a situation where the severe and debilitating pain alleged is present. The claimant in th past has been noted to exaggerate his pain symptoms, and the

Administrative Law Judge, having all the evidence, including, but not limited to, his own observations of the claimant, does not find fully credible the claimant's allegations of severe and debilitating pain precluding the claimant's function. Rather the Administrative Law Judge finds the evidence indicates the claimant retains the ability to perform at least light exertional functions, at the sedentary exertional level, which might be consistent with Dr. Cross' own physical capacities evaluation at Exhibti D-35, indicating the capacity to at least occasionally lift 20 pounds, but with the claimant required to frequently lift shift his position, alternating between sitting and standing, which this Administrative Law Judge finds as a responsible requirement. Further the Administrative Law Judge accepts the limitations on use of the claimant's left upper extremity indicated and associated with his cervical disc problems. While the Dr. Cross would restrict the claimant in use of his arm for pushing and pulling movements, allowing gross grasping and fine manipulations, the Administrative Law Judge will

accept the claimant might be restricted also in his fine manipulation. And Dr. Cross, for reasons unclear in the medical evidence, restrict the claimant in use of his right upper extremity, which is not documented in the medical evidence as a significant or continuing problem. The Administrative Law Judge finds the preponderance of the credible evidence indicates the claimant retains the ability to use right upper extremity effectively, with the evidence indicating that such capacity has been present for the entire period in question.

The claimant's other significant problems involve the emotional component to his condition, with evidence of severe anxiety and some depression associated with his condition, his perception of his problems, and his change in lifestyle. However, the claimant's treatment for such problems is very limited, with the claimant having been seen by psychologists twice both at the direction of his representative, with no evidence he is under regular treatment by such psychologists. Additionally the claimant has undersgone consultative for the Social Security

Administration by Dr. Eric R. Duerr. All the psychologists agree that the claimant suffers with the anxiety and depression noted. There are consistent indications of at least dysthymic disorder with feelings of anxiety. But the notes also indicate the claimant appears consistently alert, cleraly conscious and aware of his surroundings and oriented. There is no indication of gross disturbance in his though processes, or in contteent, through the claimant does acknowledge that occasionally he has had thoughts of suicide. there is no evidence of hallucinations or illusion, and the Administrative Law Judge finds no showing of psychotic features. Ad noted by Dr. Duerr in his report the claimant's attentivenes and ability to maintain concentration were good when he was involved in a task, but he was distracted by his back pain between tasks. While the claimant complained of headache, once he was underway he was bale to function reasonably normally. The claimant's memorary was noted to be basically intact. The claimant's difficulty appeared to be his problems with perception of his pain, and his

apparent desire to obtain benefits.

The Administrative Law Judge notes particularly the multiple report os Dr. George, with the conclusions of sever and debilitating problems restricting the claimant. The Administrative Law Judge fully considered such reports of Dr. George at pages 6 and 7 of his previous decision issued January 27, 1988. Such considerations of Dr. George's conclusions is adopted herein by reference there to as if copied in full. As noted the Administrative Law Judge has given appropriate weight to Dr. George's conclusions, but does not find such controlling nor supported by the preponderance of the credible evidence. Rather, there are few objective clinical findings, mainly reciting the claimant's own subjective complaints. The Administrative Law Judge is familiar with similar reports from Dr. George, and to consistent experience has been that Dr. George's reports are strongly worded as to the opinions of the individual's diability but do not support such factual basis. The Administrative Law Judge accepts that the claimant's emotional problems do

result in restrictions to his ability to function vocationally. They would limit him from stressful positions such as supervision or managment. He would be restricted to reoutine and repetitive functions rather than complex and varied type work tasks. And he would be limited in his ability to amintina intense interaction wtih co-workers and the public such as sales and influencing others, though the claimant should be capable of casual interaction in a more normal manner.

At the claimant's current hearing testimony was received from a vocational expert. The vocational expert reviewed the claimant's past relevant work activity, particularly noting the advertising clerk work in the music industry which was semi-skilled and sedentary. But it was clarified that while semi-skilled, the work was basically entry level and was low stress. The vocational expert was posedhypothetical questions assuming the claimant's vocational factors and assuming limitations as reviewed above in the body of the decision. The vocational expert noted that with such restrictions the individual

could perform the advertising clerk job as he had perfomred usch in the past. The vocational expert went on to note other clerical positions, such a coding clerk for various government entities and insurance clerk work, which exist in significant numbers in the claimant's home area or in several regions o fthe country and qualify as substantial gainful activity and which were within the residual functional capacity indicated. The Administrative Law Judge further notes additional questions posed considering the claimant's testimony and the alleged level of pain, and also the restrictions indicated in various medical evdience throughout the record which would restrict the claimant. However the Administrative Law Judge has considered such in preparing his hypothetical question. The Administrative Law Judge finds that the hypothetical question posed is based upon the preponderance of the credible evidence indicating the claimant's capacity to function vocationally, and that the claimant should be capable of functioning as indicated and performed the jobs noted, including his past relevant work.

The Administrative Law Judge has prepared this decision in accordance with the directions of the Appeals Council and of the Court. He has considered the various directions in the magistrate's report, including full consideration of the claimant;'s emtional problems, with particular attention to the "sit and rave" test. The Administrati ve Law Judge has not used such a test, rather considering the overall evideence of observations of the claimant throughout the record, which does not show a severe emotional component too the claimant's condition to preclude all function, through he would be restricted. Such must be a subjective judgment based upon the preponderance of the credible evidence, and this Administrative Law Judge must make such based upon all the evidence avilable. The indications are the claimatn has restricted his medical treatment for his condition, and he ahs demonstrative the capcaity to reasonably function through his condition, though he has limited his activities. This is noted in the Psychiatric Review Technique form attached to this decision. However, while the claimatn does

suffere with a severe impariment within the meaning of the Act, the evidence indicates he retains the abiliity to function to some degreee and to perform vocational activities as noted above.

With regard to the claimant's physical condition, the Administrative Law Judge has considered the "new and material" evidence cited in the report of the magistrate. He has considered such in conjunction with the overall mecdial evidence, including notes of the claimant's very limited treatment during the majority of the period in question and the indications of his very restrictd treatment by Dr. Cross since returning to the doctor. Ther are noted discrepancies and disagreements between the carious orthopedic spealists, and the Administrative Law Judge finds the preponderance of the credible evidence does not support the severe and debilitating restrictions indicated by Dr. Cross. The claimaint retaining the ability to function and perform sedentary exertional activities as indicated in the question posed to the vocational expert, witht he restrictions

noted, requiring that he be able to sit or stand at his own volition to relieve discomfort and limiting use of his left upper extremity, though not precluding use of such. The claimant's pain has also been considered, together with the requirements for treatment and control, and any side effects which might be involved. But is is clear the claimant retains the ability to move about, to function reasonably, and perform vocational activities as indicated.

The preponderance of the credible evidence indicates the claimant, while not engaging insubstantial gainful activity during the period in question, and while having severe impariments with the meaning of the Social Security Act, does not have impairments meeting or equalling impairments listed in Appendix I to Subpart P of Social Security Regulations No. 4. The next step in the sequential evaluation process calls for determination if the claimant can perform his past relevant work. While the Administrative Law Judge acknowledges the claimant canno perform the heavy and medium exertional functions invovlved in much of the claimant's past relevant work

activities, functions involved in much of the claimant's past relevant work activities, the sedentary type work activities as an advertising clerk in the music business are within the capacity retained by the claimant. Additionally the Administrative Law Judge notes that even if the claimant were not able to perform such jobs or such jobs were determined to not be appropriate past relevant work, with the shifting of the burden, there are jobs, qualifying as substantial gainful activity, allowing for the restrictions noted, which the claimant could perform. Therefore, the Administrative Law Judge recommends that it be found that the claimant is "not disabled" within the meaning of the Social Security Act during the period under consideration.

RECOMMENDED FINDINGS

After careful consideration of the entiere recor, the Administrative Law Jude recommends the following findings:

1. The claimant met the disability insured status requirements of the Act on January 26, 1984, the date the claimant stated he became unable to work, and continued to meet them through Septmebr 30, 1986, but

not thereafter.

2. The claimant has not engaged in substantial gainful activity since prior to his alleged onset date in January, 1984.

3. The medical evidence establishes that the claimant has severe residuals associated with back surgeries (multiple procedures), including spine fusion with the preponderance of the credible evdience indicating solid fusion though with one doctor noting possible current symptomatic pseudoarthrosis at L5-S1; degenerative disc disease of the cervical spine, with compliants of radiculopathy particularly affecting the left upper extremity; and dysthymic disorder and anxiety and depression assosciated with the claimant's physical problems and has change in lifestyle. However, he does not have an impariment or combination of impairments listed in, or medically equal to one listed in Appendix I, Subpart P, Regulations No. 4.

4. The claimant's subjective complaints of pain and of limitations, including his overall allegations of severe and debilitating pain and of severe depressive porblems, are disproportionate to objective medical findings in the record. The Administrative Law Judge does acknowledge some component of pain and depression associated with the claimant's condition resulting in limitations discussed below, but does not find the proponderance of the credible evidence, as discussed in the body of the decision, supports a finding the claimant's conditions so restrict him that he cannot function on a sustained basis and perform vocational activities in a noraml work environment on a sustained basis.

5. The claimant has the residual functional capacity to perform work-related activities except for work involving heavy or moderate

activities, with the claimant restricted to very light lifting. The claimnt's doctors have indicated the capacity to lift occasionally 20 pounds, though this Administrative Law Judge will accept the claimant is restricted to essentially sedentary vocational activities. Additionally the claimant would be required to be able to shift his position, alternating between sitting and standing to relieve discomfort, much as the claimant has been noted to do at his hearings and in other observations of the claimant. Additionally the claimant suffere swith some degree of cervical spinal problems resulting in left upper extremity difficulties. The claimant is restricted from extensive activities using such left upper extremity such as pushing and pulling movements. It will be accepted he will have problems with fine manipulations, thought he claimant can use such upper extremity for gross movements and functions. And the claimant's emotional problems do restrict the claimant, limiting him to very low stress type activity. He would be precluded from complex and varied work tasks, limited to more routine and repetitive type entry level functions. He cannot perform supervision or management functions, and is limited in his ability to deal effectively with the public and co-workers on an intense basis such as selling of influencing others. However, he can maintain casual, more normal contact with the public and co-workers. Further, the Administrative Law Judge specifically finds the claimant retains the ability to maintain himself in a work environment on a sustained basis with his combination of impairments (20CFR 404.1545 and 416.945).

6. The claimant's past relevant work as advertising clerk inthe music business, together with other clerical jobs noted by the vocational expert to allow for the limitations indicated such as coding clerks

various government agencies andin the insurance industry, did an ddo not require the performance of work-realted activities precluded by the above limiation(s) (20 CFR 404.1565 and 416.965).

7. The claimant's impariments do not prevent the claimant from performing his past relevant work or such other jobs which qualify as substantial gainful activity.

8. The claimant was not under a "disability" as defined in the Social Security Act, at any time under consideration in this decision (20 CFR 404.1520(e) and 416.920(e)).

RECOMMENDED DECISION

It is the recommended decision of the Administrative Law Judge that, based upon the application filed on September 10, 1985 and October 27, 1986, with a protective filing date for supplemental security income purpose of October 24, 1986 the claimatn is not entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectivly, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act. This decision is a recommendation only. The

Appeals Council will issue a final decision.

Joel S. Thwaites/s/
JOEL S. THWAITES
ADMINISTRATIVE LAW JUDGE

August 31, 1989
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN LOWERY III	:	*FILED AUG 1 1988*
Plaintiff,	:	
v.	:	CIVIL ACTION
LOUIS W. SULLIVAN, M.D., Secretary of Heath and Human Services	:	NO.1:87-cv-1420-ODE
Defendant.	:	

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff brings this action pursuant to 42 U.S.C. §405(g) to obtain judicial relief from the final decision of the Secretary of Health and Human Services which denied his request for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) under 42 U.S.C.§§216(i) and 223.

Plaintiff filed his applications for SSI and DIB on September 10, 1985. Record 325-55, 361-70, hereinafter R.)[1] These applications were denied

Appendix G

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[1]Plaintiff previously received DIB and SSI commencing May, 1981. (R. 283) The plaintiff was notified that his disability had ceased in March 1980 following an administrative hearing. (R336-41) Plaintiff did not pursue available judicial remedies. The determination became final as of August 29, 1984. (R. 350-51).

initially and upon reconsideration. Plaintiff received a de novo hearing before an Administrative Law Judge (ALJ) on May 2, 1986. (R.61-97) The ALJ rendered his adverse decision on September 9, 1986. (R.11-21) After further review, this decision became the final decision of the Appeals Council on April 21, 1987. (R.4-5) The decision thereafteer became the final decision of the Secretary. Oral argument was held before the magistrate on April 4, 1988. This case is currently before the magistrate on the parties' pleadings, brief, oral argument and additional medical evidence submitted by plaintiff.

Mr. Lowery was thirty-one years old at the time of his hearing. He has a high school education and his past erelevant work was telephone line worker, warehouse order puller, and record advertising clerk. He alleges disability due to back surgery residuals, depression and anxiety.

Relevant findings of the ALJ are as follows:

> 1. The claimaant met the disability insured status requirments of .the Act on January 26, 1984, the amended onset date,

the date claimant stated he became unable to work, and continues to meet them through the date of this decision.

3. The medical evidence establishes that the claimant has severe post-surgical low-back syndrome, depression, and anxiety, but that he does not have an impairment or combination of impariments listed in, or medically equal to one listed in Appendix One, Subpart P, Regulations No. 4.

4. The claimant's subjective allegations of leg and back pain and weaknes to such an extent that he cannot stand, walk or sit more than very brief intervals are not supported by medical signs and findings, nor are his subjective allegations of loss of ability to concentrate and inability to maintain interpersonal relationships.

5. The claimant has the residual functional capacity to perform work-related activities except for work involving more than light lifting or carrying, prolonged standing and walking, or exposure to highly stressful environments. (20 C.F.R. §§404.1545 and 416.945)

6. The claimant's past relevant work as advertising clerk in the record industry did not require the performance of work-related activities precluded by the above limitation(s). (20 C.F.R. §§404.1565 and 416.965)

7. The claimant's impairments do not prevent from performing his past relevant work.

(R.20) Based on the above findings, the ALJ concluded that Mr. Lowery was not disabled within the meaning of the Social Security Act.

This court's function in reviewing the final

decision of the Secetary is not to try the case de novo nor to reweigh the evidence. Rather, it is to determine whether there is substantial evidence in the record, considered as a whole, to support the Secretary's findings and whether proper legal standards were applied to the fact-finding process. 42 U.S.C. §405(g); Walden v. Schweiker, 672 F.2d 835 (11th Cir. 1982); Davis v. Schweiker, 641 F.2d 283 (5th Cir. 1981) The Secretary's findings must be sustained if supported by substantial evidence and proper legal standards were applied. Substantial evidence means such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion". NRLB v. Columbian Enameling and Stamping Co., 306 US. 292, 300 (1939) Additionally, it must be enough to justify a refusal to direct a verdict were the case before a jury. Richardson v. Perales, 402. U.S. 389 (1971); Walden v. Schweiker, 672 F.2d 835 (11th cir. 1982)

In order to qualify for disability benefits, claimant has the burden of producing sufficient evidence, medical or otherwise, to show that he

was under a "disability" within the meaning of the Social Security Act. Kirkland v. Weinberger, 480 F.2d 46 (5th Cir.), cert.denied 414 U.S. 913 (1973); Hart v. Finch, 440 F.2d 1340 (5th Cir. 1971) Disability is defined as inability to "engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or...last for a continuous period of not less than twelve months." 42 U.S.C. §423(d)(1)(A), §1382c(a)(3)(A) The impairment must result from anatomical or physiological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. It must be of such severity that claimant is not only unable to do previous work but cannot, considering his age, education and work experience engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacany exists for him, or whether claimant would be hired if he applied for work. 42 U.S.C. § §423(d)(2), 423(d)(3).

The magistrate will first address the plaintiff's letter and motion for remand filed on June 8, 1988. Plaintiff requests that the case be remanded for consideration of new medical evidence, consisting of two medical reports by Dr. Cross, plaintiff's treating surgeon. Dr. Cross' report of April 4, 1988 states that X-ray evidence on that day indicated that plaintiff had a pseudarthrosis. Dr. Cross states plaintiff continues to be significantly handicapped by back and bilateral leg pain, and states plaintiff has restricted motion of the lumbar spine including forward flexes of 20 degrees and extension of 0 degrees. Dr. Cross concludes:

> It is my opinion having known this patient since April 14, 1981, that he is, indeed, totally disabled at this point. His prognosis for improvement is poor. I consider his disability to be permanent.

(Exhibit AA)

In his second report, dated May 2, 1988, Dr. Cross states plaintiff has a pseudarthrosis of his lumbar spinal fusion. Dr. Cross states that plaintiff's current pain problem relates to the condition for which he was treated by Dr. Cross

on a continuous basis from April 1981 until 1983. (Exhibit BB)

To establish whether remand is warranted because of new medical evidence, plaintiff must prove:

> 1. There is new, non-cumulative evidence;
>
> 2. The evidence is "material", whcih means relevant, probative, and that there is a reasonable possibility that it would change the administrative result; an d
>
> 3. There is good cause for failure to submit the evidence at the administrative level.

Cherry v. Heckler, 760 F.2d 1186 (11th Cir. 1985) Defendant does not object to remanding the case for consideration of the new medical evidence. Plaintiff has demonstrated that the new evidence is not cumulative, as it is the first objective medical findings which show that plaintiff's treatment for his pseudoarthrosis in 1983 was not successful. Plaintiff has also shown that this new evidence may be material because it is shown that this new evidence may be material because it is objective evidence of a disabling condition which may cause the pain of which plaintiff

complains. Plaintiff has also shown that there is good cause for failure to submit the evdience at the administrative level because the evidence was not available at the time of plaintif's hearing, plaintiff had not been represented by counsel through the entire hearing procedure and plaintiff may have been unaware of what he needed to prove his case. Therefore, the magistrate finds the plaintiff has met the three-prong standard for remand under Cherry v. Heckler, 760 F.2d at 1192. Plaintiff's motion for remand to consider the new medical evidence should be GRANTED.

Plaintiff also moves for reversal or remand because the ALJ failed to properly consider plaintiff's impairments in combination. On remand, the ALJ will consider the new medical evidence submitted by plaintiff and should make a new determination of the ffect of the combination of plaintiff's impairments as required by the Social Security Regulations and the Eleventh Circuit. See Walden v. Schweiker, 672. F2d 835 (11th Cir. 1982)

Plaintiff also contends that the ALJ used an

improper legal standard to evaluate the severity of plaintiff's emotional condition. In particular, the ALJ made his own observations at the hearing of "no outward signs of pain or showing any difficulty in maintaining good concentration and clear, coherent thinking". (R. 19) Plaitniff complains the ALJ is not a medical expert and should not arrive at an index of traits which he expects plaintiff to manifest at the hearing. (Plaintiff's Brief, p. 20)

The Eleventh Circuit has expressly rejected findings by ALJ's based upon the so called "sit and squirm" standard, whereby the superficial impressions gained by an ALJ during a heairng by watching for displays of pain, discomfort or anxiety are used to reach a decision regarding disability. Freeman vs. Schweiker, 681 F.2d 727, 931 (11th Cir. 1982) The Eleventh Circuit also states that a "sit and rave" index would be equally erroneous if employed by an ALJ to attempt to determine whether or not a person is disabled as a result of psychiatric difficulties by relying on plaintiff's apparent "attentiveness" at a hearing. Watts vs. Heckler,

No. C83-445A (N.D. Ga. March 6, 1984)

Defendant argues that the ALJ did not engage in "sit and squirm" jurisprudence, because the evaluation of two one-time psychological evaluations in comparison with other observed activity over a period of time is critical in evaluating plaintiff's credibility. See Norris v. Heckler, 760 F.2d 1154 (11th Cir. 1985)

A review of the record reveals that the ALJ concluded:

> The extreme degree of pain reported by Mr. Lowery to Dr. Duerr is out of keeping with his general appearance at the hearing[the ALJ's supplemental hearing] and is also out of keeping with the findings of Dr. Cross. Dr. Duerr...condluded taht Mr. Lowery would be unable to maintain concentration for longer than five or ten minutes at a time due to pain. He certainly did not evince such a loss of concentration at the hearing which lasted about one hour.

(R. 16) The ALJ also stated:

> Though the psychologist who examined Mr. Lowery in July 1986 found inability to concentrate for more than very brief intervals, the Administrative Law Judge concludes that this is an inaccurate finding since it is not supported by the findings of the psychologist who examined Mr. Lowery in May 1986, nor is it supported by actual observation of the Administrative Law Judge at the

> hearing. It is not reasonable to conclude that Mr. Lowery would have been unable to maintain normal concentration at the time of the psychological examination in July, when he was able to maintain perfectly normal concentration at the hearing.

(R.17) The ALJ also found that plaintiff's ability to visit with friends, including his girlfriend and to play guitar as a hobby did not indicate the difficulty in maintaining personal relationships that the psychologists had reported.

The magistrate finds that the ALJ has misstated the evidence in several instances. For example, he states that the psychologist who examined plaintiff in May 1986 did not support the second psychologist's finding that plaintiff had an inability to concentrate. However, that psychologist, Dr. George stated in his report:

> His depression is so severe that it impairs his ability to concentrate and to use sound judgment.

(R. 455) The ALJ also states Mr. Lowery told the ALJ he continued to visit with friends and to play guitar as a hobby. A review of the supplemental hearing shows that he did not have problems socializing with co-workers "until the

end when I had surgery and took off work". (R. 77) Plaintiff also stated that he did not like being around people besides his girlfriend and he did not go to the show or the movies or go out to eat. (R. 77-78) Plaintiff's girlfriend state dthat plaintiff would not stay and visit with friends but he would go and lie down in a van. (R.81) The ALJ also stated that plaintiff payed the guitar as a hobby, but at the supplemental hearing, plaintiff and his girlfriend said that when plaintiff tries to play the guitar he just feels like "cramming that against the wall". (R. 73, 80)

It appears to the magistrate that the ALJ has formed his conclusions about plaintiff's mental capabilities from a "sit and squirm" test. Comparisons with other observed activity over a period of time in order to bolster the ALJ's observances at the supplemental hearing have all been based on inaccurate characterizations of the evidence and plaintiff's testimony. Therefore, the magistrate RECOMMENDS that this case also be REMANDED for proper evaluation of the psychological reports. The ALJ should not

substitute his opinions based on his observation of plaintiff for the opinions of two medical professionals. The ALJ should carefully consider the psychologist's report in light of the new medical evidence which may be considered as objective medical evidence of the pain whcih could be causing plaintiff's psychological problems.

Plaintiff also contends that this should be remanded for new Vocational Expert (VE) testimony because the VE was not presented with new hypothetical questions after Dr. Duerr's psychological report was put into evidence. The magistrate RECOMMENDS that a Vocational Expert be consulted if consideration of the new evidence should result in conclusions by the ALJ which would be the basis of new hypothetical questions which should be presented to a VE.

RECOMMENDATION

Accordingly, for the reasons stated above, the magistreate RECOMMENDS that the case be REMANDED for the consideration of new medical evidence and for the application of proper legal standards.

SO REPORTED AND RECOMMENDED, this 1st day of August, 1988.

John E. Dougherty/s/
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE

ENTERED ON DOCKET
AUG 3 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELSIE COMPTON,	:	*FILED AUG 24 1990*
Plaintiff,	:	
v.	:	CIVIL ACTION
LOUIS W. SULLIVAN, M.D., Secretary of Heath and Human Services	:	NO.1:89-cv-1107-MHS
Defendant.	:	

ORDER

Presently before the Court are plaintiff's objections th ereport and recommendation of the magistrate in this Social Security Act case. The magistrate concluded that defendant's decision to deny plaintiff social security disability benefits was supported by substantial evidence. For the reasons stated below, the Court disagrees with the magistrate and reverses and remands this action for an award of disability benefits.

Plaintiff Elsie L. Compton ("Compton") seeks benefits for neck and back injuries that she claims have left her homebound and clinically

depressed.[1] After a hearing on April 21, 1988, an administrative law judge ("ALJ") denied her application for benefits in a decision dated November 23, 1988. The ALJ found that Compton had not engaged in substantial gainful activity since 1979, and that she had severe neck and back impairments. The ALJ concluded, however, that plaintiff's injuries did not preclude her from performing her past relevant work and that she therefore was not disabled prior to the expiration of her insured status on June 30, 1984. The appeals council of the Social Security Administration denied plaintiff's request for review of the ALJ's decision on April 28, 1989.

The ALJ found that plaintiff was not disabled for three principal reasons. First, the ALJ determined that, following a reasonable recuperative period after her April 1984 surgery, Compton's back condition improved significantly.

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[1]This action involves the second application for benefits filed by Compton, who was injured at work in August 1979 and has undergone neck and back surgery on three occasions since then. The first application based on her initial injury in 1979, was denied on December 10, 1984, and is no the basis for this appeal. This application claims an onset date of disability of February 8, 1984, about the time of her second application.

Record at 15.[2] The ALJ based this finding on the absence of records stating that plaintiff had post-operative problems and a March 1985 evaluation by an independent medical examiner revealing only "minimal abnormal clinical findings" and concluding that she could perform light work safely. Second, the ALJ found that Compton's psychological problems did not exist prior to the expiration of her insured status. Record at 16. In reaching this conclusion, the ALJ stated that there was no evidence that plaintiff sought or received any psychological treatment or evaluations prior to 1987, and discredited the opinion of her treating psychiatrist/neurologist that Compton had been unable to work since 1979. Third, the ALJ concluded that Compton's testimony "as to the severity of her symptoms and limitations [prior to the date last insured] cannot be considered fully credible." Record at 16. In thi regard, the ALJ surmised that there was no clinical basis

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[2]All citations to the record refer to the administrative record compiled by the Department of Health and Human Services.

for such pain and repeated his belief that plaintiff's condition improved after surgery. The ALJ also observed that there was no record of visits by plaintiff to her orthopedist between November 1984 and October 1986. Record at 17.

Although the Court finds troubling the ALJ's repeated reliance on what might be termed negative evidence (namely the absence of clinical findings and gaps in plaintiff's treatment history), the Court cannot substiute its judgment for that of defendant and must affirm the ALJ's decision if it is based on "such relevant evidence as a reasonable person would accept as adequate to support a conclusion." MacGregor v. Bowen, 786 F.2d 1050, 1053 (11th Cir. 1986) (citations omitted) At the same time, "[i]t is incumbent upon the reviewing court to examine the findings and decision of the Secretary in light of the record in its entirety, not only that evidence which supports the decision." Lamb v. Bowen, 847 F.2d 698, 701 (11th Cir. 1988)(citations omitted) When the Courrt reviews the ALJ's decision in this manner, the Court cannot conclude that the outcome is supported by

substantial evidence.

The ALJ placed considerable reliance on portions of an independent medical examination conducted in March 1985 by Dr. E. Ladd Jones, Jr. at the request of a workers' compensation insurance company. In this report, Dr. Jones stated "I thing it would be safe for [Compton] to engage in light work as long as the work did not involved prolonged sitting, frequent bending, heavy lifting, or climbing activities." Record at 223. The ALJ primarily relies on Dr. Jones' opinion to support his conclusion that plaintiff "regained the residual functional capacity...to perform a wide range of light work" within six months of surgery. Record at 17.[3]

The ALJ did not address, however, the contrary opinions of plaintiff's treating physicians beginning in 1980. After an office visit on April 29, 1980, Dr. Allan J. Korsower, the physician who performed sugery after

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[3]The ALJ fails to mention two less favorable findings by Dr. Jones. First, Dr. Jones indicated that plaintiff was still experiencing low back pain, which he attributed to her surgery. Second, Dr. Jones estimated that plaintiff had suffered "twenty percent whole body permanent physical impairment and loss of physical function" as a result of her surgeries. Record at 223.

Compton's original injury in 1979, stated "I feel she is essentially disabled on the subjective complaints of her persistent low back pain." Record at 162. Dr. Korsower also indicated that Compton was "unable to resume her former employment because of chronic low bak syndrome, status post lumber laminectomy and diskectomy." Record at 162. On March 24, 1981, Dr. Korsower reported that Compton was totally and permanently disabled and could not return to her past work nor any other job. Record at 167.

In addition, office records maintained by Dr. Joseph W. Boecker from April 3, 1981 through November 9, 1984, reveal that Compton experienced persistent back problems and often required pain medication. Record at 194-212. While the ALJ identified a gap in those records between 1984 and 1986, Dr. Boecker cited Compton's history of neck and back problems in disability reports filed with the Georgia Department of Human Resources in OCtober 1986 and January 1987. Record at 224-227. In the latter report, Dr. Boecker wrote "patient still totally and permanently disabled." Record at 227.

Inasmuch as Dr. Boecker had treated for back problems since 1981, the Court concludes that this statement referenced her neck and back conditions.

The Court cannot understand how the ALJ could ignore the conclusions of Drs. Korsower and Boecker concerning Compton's disability in favor of a physician who examined plaintiff on one occasion. The Eleventh Circuit repeatedly has held that:

> Absent a showing of good cause to the contrary, the opinions of treating physicians must be accorded substantial or considerable weight by the Secretary. The reports of reviewing nonexamining physicians do not constitute substantial evidence on which to base an administrative decision. The good cause required before the treating physicians' opinions may be accorded little weight is not provided by the report of nonexamining physician where it contradicts the report of the treating physician.

Lamb, 847 F.2d at 703 (citations omitted) The ALJ failed to accord the required weight to the opinions of plaintiff's treating physicians. The Court threfore questions whether the ALJ simply chose the opinion that would support a negative diasbility finding and ignored the contrary

evidence. Under such circumstances, the ALJ's decision that Compton was not diabled is not a deicsion supported by substantial evidence.

The Court also must reject the ALJ's finding that "there is absolutely no evidence of any [psychological] impairment on or before the date last insured." Record at 16 The ALJ observed that Compton did not see a mental health professional prior to June 30, 1984. The ALJ did not attach significance, however, to evidence of plaintiff's psychological probelsm that predated her consultations with a mental health professional. Dr. Jorsower noted on October 26, 1979, that Compton was "under considerable situational stress". Record at 163. Dr. Boecker's office notes reveal frequent prescription of anti-depressant drugs beginning in 1982. This evidence was corrobated by subjective evidence from plaintiff and her daughter. Record at 68-69; Record at 72-74.

Contrary to defendant's apparent belief, an individual may suffer debilitating anxiety and depression long before seeking professional help. Indeed, unwillingness or inability to obtain such

assistance is often a symptom of psychological disorder. Because the ALJ refused to consider evidence of psychological probelms that predated plaintiff's efforts to seek therapy, the ALJ improperly failed to consider whether her emotional condition exacerbated her physical impairments.[4] "It is now well settled that the ALJ must consider the combined effects of a claimant's impairments in determining whether [the claimant] is disabled." Jones v. Bowen, 810 F.2d 1001, 1006 (11th Cir. 1986) The ALJ should have considered the effect of plaintiff's psychological problems, even if such impairment was not itself disabling. Bowen vs. Heckler, 748

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[4]The ALJ also showed undue hostility to the report of Dr. James S. Cheatham, plaintiff's treating psychiatrist/neurologist. The ALJ erroneously stated that "[there is no evidence that Dr. Cheatham had reviewed any of the claimant's prior medical records" and, therefore, assisnged "absolutely no credibility to his assertion that claimant has been totally unable to work since 1979". Record at 16. In fact, Dr. Cheatham referenced relevant medical records in a letter to Dr. Boecker after he first saw plaintiff. Record at 238-39. Moreover, Dr. Cheatham's clinical findings were corroborated by Dr. John G. Hoffler, who examined Compton at the request of the ALJ. Record at 294-95.

F.2d 629, 635 (11th Cir. 1984)[5]

In sum, the Court concludes that the denial of Compton's application for disability benefits was not supported by substantial evidence. Specifically, defendant errred when it found that plaintiff could still perform her past relevant work. Because plaintiff could not perform her past relevant work, defendant should have assessed plaintiff's residual functional capacity, age, education, and past work experience to determine whether plaintiff could perform any other work. 20 C.F.R. §404.1520(f) Under the applicable regulations, consideration of those factors compelled a disability finding. 20 C.F.R. §404, Subpt. P, App. 2. The Court therefore finds that plaintiff is disabled within the meaning of the Social Security Act and

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[5]The Court does not reach the issue of wether the ALJ should have placed greater weight on plaintiff's testimony as to her symptoms. The Court notes, however, that the ALJ might have credited her testimony more if he had not taken such a de minimis view of her physical condition. "Whether or not the [claimant's] condition could be expected to give rise to the complained of pain isa question of fact subject to the substantial evidence standard of review". Lamb, 847 F.2d at 702. When the entire record is considered, it would appear that there is substantial evidence that plaintiff's medical condition "could reasonably be expected to give rise to the complained of pain". Id.

entitled to disability benefits.

For the foregoing reasons, the Court REVERSES and REMANDS this action with instructions to the Secretary that plaintiff is entitled to an award of social security diability benefits starting February 8, 1984.

IT IS SO ORDERED, this 24th day of August, 1990.

Marvin H. Shoob, Judge/s/
Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

ENTERED ON DOCKET
AUG 27 1990